Nelson

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 266

THE UNITED STATES EXPRESS COMPANY, PLAINTIFFS IN ERROR,

vs.

KOUNTZE BROTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED MARCH 2, 1868.

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ment
affirmed
Nov 26/69

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INDEX.

	Original.	Print.
Style of court	1	1
Petition	1	1
Summons	4	2
Sheriff's return	5	3
Answer	6	3
Replication	20	12
Demurrer to replication	24	14
Order overruling demurrer to replication	25	14
Jury impannelled	25	15
Verdict	26	15
Bill of exceptions	26	16
Testimony of Augustus Kountze	26	16
S. D. Barkalow	27	16
Cross	28	17
Joseph Sheppard	29	18
Cross	30	18
Edward Shelden	31	19
Cross	31	19
Fredrick Crummer	32	19
Cross	32	20
Exhibits "A," "B," "C," offered in evidence	33	20
Testimony of Augustus Kountze, recalled	33	20
Cross	33	20

	Original.	Print.
Exhibit "A"	35	21
"B"	36	23
"C"	36	24
Receipt	38	24
Deposition of John Q. Naylor	39	25
Charles H. Angel	43	28
Luke Benham	45	29
Samuel B. Woolworth, jr	47	30
Alexander H. Lacy	51	32
William F. Allen	53	32
James M. Smith	54	34
John S. Harris	56	35
Frank Bradley	59	37
Motion for new trial	61	38
Order overruling motion for new trial	62	39
Judgment	62	39
Bond for damages and costs	63	39
Writ of error	64	41
Citation and admission of service	65	41
Certificate of clerk	65	41

1 UNITED STATES OF AMERICA, *District of Nebraska, ss:*

Pleas before the Honorable James M. Love, United States district judge for the district of Iowa, and acting United States district judge for the district of Nebraska, sitting in the United States Circuit Court for the district of Nebraska, at a term thereof holden at the capitol in the city of Omaha, begun on the sixth day of May, one thousand eight hundred and sixty-seven, and continued thence by adjournment thereof, from day to day, to the twelvth day of July, in the said year.

KOUNTZE BROTHERS
vs.
THE UNITED STATES EXPRESS COMPANY.

Be it remembered, that on the 30 day of July, 1867, came into the said United States Circuit Court for the district of Nebraska the said plaintiffs, Kountze Brothers, by Redick & Briggs, their attorneys, and filed therein certain papers, copies whereof, with the endorsements therein, are in the words and figures following, to wit:

In District Court, Douglas county.

Petition.

KOUNTZE BROTHERS, plaintiffs,
vs.
UNITED STATES EXPRESS COMPANY, defendant.

The said Kountze Brothers, plaintiffs, who are an association of persons not incorporated, formed for the purpose of carrying on the banking business in Omaha, Nebraska, and who were on the 6th of October, 1864, and still are engaged in said business at said Omaha, complain of said United States Express Company, defendant, which is a foreign corporation, formed under and created
2 by the laws of the State of New York, and for a cause of action against said defendant, state to the court the following facts:

The plaintiffs allege that on the 6th day of October, 1864, the said defendant was and still is a common carrier of treasure, gold dust, goods, and merchandise, for hire for the public generally, from the said Omaha to Philadelphia, in the State of Pennsylvania, and also to and from all other principal towns and cities in the United and has held itself out to the public as such for the past five years; and further, that said defendant had at the date aforesaid and still has an office and managing agent in said Omaha for the transaction of its business therein.

The plaintiffs allege that on said 6th of October, 1864, they were the owners of gold dust in said Omaha to the value of three thousand and eight hundred dollars, and wishing in the course of said banking business to have the same transported from said Omaha to said city of

Philadelphia, they did on said day apply to said defendant, at its said office in said Omaha, to transport said gold dust, and said defendant promised and agreed to transport the same, and thereupon said plaintiffs delivered said gold dust to said defendant at said office, properly packed, sealed, stamped, and secured in a suitable case, and directed in legible letters to "Drexel & Co., Philadelphia, Penn.," and marked "Gold dust, $3,800," and said defendant then and there took the exclusive possession of said gold dust and gave these plaintiffs a receipt for the same, whereby said defendant then undertook,

3 promised, and agreed, for a valuable consideration in lawful money paid by these plaintiffs to said defendant, (being their usual charge and tariff for the same,) to safely transport said gold dust to said Philadelphia, and deliver the same to said Drexel & Co., within a reasonable time, which reasonable time would not exceed ten days from the time said gold dust was delivered to said defendant as aforesaid.

The plaintiffs allege that the said defendant neglected and has wholly failed to deliver said gold dust to said Drexel & Co., at said Philadelphia, (or anywhere else,) as it agreed to do, and still fails to deliver the same, except a small part of said gold dust, which said defendant has returned to the plaintiff.

And plaintiffs allege that said defendant has wholly lost and refuses to account for one hundred and seventeen ounces of said gold dust, worth two thousand and nine hundred ($2,900) dollars, and still wholly refuse to deliver said 117 ounces of gold dust to said Drexel & Co. or to the plaintiffs, and refuse to account or pay for the same, though often requested so to do; whereby in consequence of the negligence and wrongs of said defendant in the premises, the said plaintiffs have sustained damages in the sum of $2,900, the value of said 117 ounces of gold dust.

Whereupon said plaintiffs pray judgment against said defendant for said sum of two thousand nine hundred dollars, and interest on the same from the 6th day of October, 1864, and costs.

REDICK & BRIGGS,
Att'ys for Pl'ffs.

TERRITORY OF NEBRASKA, *Douglas County*:

4 H. Kountze, being by me first duly sworn, deposes and says, that he is one of the plaintiffs in the above action and petition; that he has heard read the said petition, and knows the contents thereof, and that the same is true as he verily believes.

H. KOUNTZE.

Subscribed in my presence and sworn to before me this 23rd day of March, 1866.

[SEAL.] DAN. GANTT,
Notary Public for Douglas Co., N. T.

And upon the said papers were the following endorsements, to wit: No. 9, D. District Court, Douglas county. Kountze Brothers *vs.*

United States Express Co. Petition filed March 23rd, 1866. Wm. Kellog, jr., clerk. Redick & Briggs, att'ys for pl'ffs. Filed July 3rd, 1867. E. B. Chandler, clerk.

Summons.

The Territory of Nebraska, Douglas county, to the sheriff of the county of Douglas:

You are commanded to notify the defendant, the United States Express Company, that he has been sued by Kountze Brothers in the District Court of Douglas county; that unless he answer by the
5 23rd day of April, A. D. 1866, the petition of the said plaintiff against him, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 2nd day of April, A. D. 1866.

Witness my signature and the seal of said court at Omaha, this 23rd day of March, A. D. 1866.

[SEAL.] WM. KELLOGG, JR., *Clerk.*

And upon the said papers were the following endorsements, to wit:

Doc. D, page 9. District Court, Douglas county. Kountze Bro's *vs.* U. S. Express Co.

Summons. Amount claimed of defendant by the plaintiff is $2,900. and interest from October 6th, 1864. Redick & Briggs, plaintiffs' att'ys.

Returned and filed March 26th, 1866. Wm, Kellog, jr., clerk.

Received March 24th, 1866 at 9 o'clock a. m. Andrew Dellone, sheriff.

Received this summons March 24th at 9 o'clock a. m.; served same day by delivering a certified copy of this writ to Derrick V. Barkslow, managing agent of United States Express Company at the defendants' office. in the city of Omaha. There not being in any county, president, mayor, chairman of the board of directors or trustees, cashier, treasurer, secretary or clerk, or other chief officer of or acting for the defendant. Andrew Dellone, sheriff Douglas county, N. T. Fees 95. Filed July 3rd, 1867. E. B. Chandler, clerk.

In the District Court, Douglas county.

6 *Answer.*

KOUNTZE BROTHERS
vs.
THE UNITED STATES EXPRESS CO.

1st. Now comes the said defendant, by A. J. Poppleton & J. M. Woolworth, its attorneys, and for its first answer to the petition of the said plaintiff, denies each and every allegation in the said petition

contained, except such things thereof as are hereinafter expressly admitted.

2nd. And for its second answer to said petition the said defendant says, that the gold dust in the said petition mentioned delivered to the said defendant as therein alleged, was so delivered by the said plaintiff and received by the said defendant to be transported from Omaha to Philadelphia, under and by virtue of a special contract made and entered into by and between said plaintiff and said defendant, and not otherwise, whereby said defendant agreed and undertook for the compensation at the rate of five dollars upon a thousand dollars in value of said gold by said plaintiffs to the said defendants to be therefor paid, to transport said gold dust from Omaha to Philadelphia for the said plaintiffs, and it was expressly agreed by and between the said parties that the said United States Express Company was not to be held liable for any loss or damages except as forwarders only, nor for any loss or damages of said package over or beyond the sum of fifty dollars, unless the just and due value thereof was stated in a receipt for said gold dust then and there by the said defendant by its said agent made and delivered to said plaintiffs, nor for any loss or damage by fire, the acts of God or of the enemies of the government, the restraints of government mobs, riots, insurrec-
7 tions or pirates, nor from any of the dangers incident to a time of war, nor unless the same was properly packed and secured for transportation.

And this defendant avers that it performed all the conditions of the said contract on its part; that it did well, faithfully, and diligently by the hands of its agents and messengers, good, faithful and trustworthy men, and in secure burglar-proof iron safes, transport and carry the said gold as in and by its aforesaid contract it had undertaken to do; that the said plaintiffs, fraudulently and deceitfully contriving and intending to deceive and defraud the said defendant, did fraudulently and deceitfully deliver said gold to the said defendant as and for gold of the just and true value, and did then and there falsely, fraudulently represent the same to be of the value of thirty-five hundred dollars and no more, and accordingly did pay to said defendant for the transportation thereof as aforesaid the sum of seventeen dollars and fifty cents and no more, and did then and there take and receive from the said defendant a receipt for said gold wherein the said gold was stated as of the value of thirty-five hundred dollars, whereas in truth and in fact the said gold was of the just and true value of four thousand dollars and over, and the said defendant was according to its customary rate of charges aforesaid entitled to have and receive for the said transportation of the said gold twenty dollars, and so the said defendant says, that the said plaintiffs falsely and fraudulently deceived and defrauded the said defendant, and the said defendant lost and was deprived of all the benefit and advantage which he might and would otherwise have derived and acquired, and it under and by virtue of the conditions of the said contract
8 was and became liable for the loss of said gold in no sum whatever save only the sum of fifty dollars.

And the said defendant further answering says, while it was so as aforesaid faithfully, diligently, and carefully transporting the said gold, to wit, at the county of in the State of Missouri, in and on the Hanibal and St. Joseph railroad, and in its cars, which was the most usual route for service of that nature, a large body of armed men, to wit, eighty men, armed with guns, pistols, and swords, then and there being in insurrection, and enemies to the government of the United States and the government of the said State of Missouri, assembled of their own authority with intent mutually to assist one another against the company, its agents, and messengers, and said railroad company, its agents, and messengers, conductors, and passengers, in plundering and robbing said defendant, its agents, and messengers, and said railroad company, its managers, conductors, and passengers, and being so assaulted, and with intent as aforesaid, did then and there stop the cars of said railroad and take forcible possession thereof, and of the persons of the conductor, managers, and passengers of said railroad cars, and of the agents and messengers of the said defendant, so as aforesaid entrusted with the care, custody, and transportation of said gold, and of its burglar-proof iron safes in which the same was securely placed, and did then and there threaten to capture, carry away and kill the said conductors, messengers, and passengers of said railroad, and the said agents and messengers of said defendant, and to destroy the said cars. and the baggage of said passengers, and the property of the said defendant, unless the said agents and messengers of said defendant did then and there surrender and deliver up to them, the said armed men,
9 the said safes so as aforesaid containing said gold and also the contents of said safes, to wit, the said gold; and the said messengers and agents of said defendant, being fearful that they would carry their said threats into execution, and being overpowered by the numbers and violence of said armed men, did and were so as aforesaid compelled to surrender and deliver up to said armed men the said gold, and they the said armed men did then and there take, carry away, and steal from said defendant by force and arms, and have ever since retained the said gold, a small part thereof hereinafter mentioned alone excepted.

And this the defendant further answering, says that at the time of the occurrences aforesaid the said State of Missouri was in a state of civil war, and the said occurrences arose from dangers incident thereto, and that the same was occasioned wholly by the acts of organized enemies of the government, as well the government of said State of Missouri as of the United States, and of a riot and insurrection, and damages incident to a time of war, and without the fault of the said defendant, or any of its agents or messengers, nor could they in any manner have foreseen or prevented the said injury, which is the same injury whereof the said plaintiffs have in their said petition complained against this defendant.

3rd. And for a third answer and defence to the said petition, this defendant says while it was in manner aforesaid transporting the said gold, and while the United States, and also the State of Missouri, were

engaged in public war with the so-called Confederate States, the army of [the army of] the said Confederate States did, in the prosecution of the said war, capture the said cars, conductors, and passengers of said railroad, and said safe, messengers, and agents of said defendant, and the said gold [and the said gold] did keep and retain, and ever since have kept and retained, a part thereof hereinafter mentioned alone excepted, which injury was occasioned by the public enemy, and without the fault of said defendant, or its agents or messengers, or person in charge of said gold, which is the same injury whereof the said plaintiffs, in their said petition, have complained against this defendant.

4th. And for a fourth answer and defence to said petition, the said defendant says that after the receipt by it of the said gold, and the loss thereof, as hereinbefore stated, at Omaha aforesaid, on or about the first day of November, eighteen hundred and sixty-four, it returned to the said plaintiffs, and they received from it, gold of the just and true value of fifteen hundred dollars, which gold so returned was a part of that sued for in this action, and is the same as that in the said petition, and is the same so by said defendant returned to said plaintiffs.

5th. For a fifth answer and defence to the said petition, the said defendant says that at divers times, commencing on the first day of January, eighteen hundred and sixty-three, and thence to the bringing of this suit, the said defendant has been engaged in carrying gold and silver, and evidences of debt, and vouchers for claims against the government, for the said plaintiffs and others, from Omaha aforesaid to divers places in the United States; that the said defendant has charged for the said service at the rate of five dollars for every thousand dollars' worth of gold, silver, evidences of debt, and vouchers so transported; and said plaintiffs have agreed to pay, and by the practice hereinafter mentioned have induced said defendant to believe that theyhave paid, the said compensation for said service; that at the several and respective times at which the said plaintiffs have delivered to said defendant gold, silver, evidences of debt, or vouchers, any or either of them, to be carried by it, the said plaintiffs, fradulently and deceitfully intending and contriving to deceive and defraud the said defendant, and to induce and procure it to carry quantities of gold, silver, evidences of debt, and vouchers as aforesaid, for a sum and sums much less than the customary charges of said defendant, to wit, five dollars per thousand, did then and there fraudulently and deceitfully represent the said gold, silver, evidences of debt, and vouchers to be of far less value and amount than they in fact were; that the said defendant believed representations to be true, and took and received and transported the said gold, silver, evidences of debt, and vouchers, as of the value the said plaintiffs so as aforesaid represented the same to have, and for the sum and sums the said defendant was entitled to receive for transporting said articles, taken at the sum or sums so valued, the said plaintiffs so as aforesaid represented the same to have and no more, and so the said plaintiffs have, at the times aforesaid, falsely

and fradulently deceived and defrauded the said defendant, and the said defendant lost and was deprived of a large part of the benefit and advantage to which it was justly entitled. All of which amount of gold, silver, evidences of debt, and vouchers, and the true value and the alleged value thereof, and the sums received and the sums to which the said defendant was entitled, are stated in the
12 account hereto annexed, marked "A." And the defendant says that by reason of the premises the said plaintiffs are justly indebted to this defendant in the full sum of $6,939 32-100, and will set off the same, or so much thereof as may be necessary, against any demands which the said plaintiffs may establish in this cause, and prays judgment for any balance which may be found to be due to it.

JAMES M. WOOLWORTH &
A. T. POPPLETON,
Def't's Att'ys.

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

James M. Woolworth, being duly sworn, says he is attorney of the said defendant in above answer, and that said answer is true, as he verily believes; that the said defendant, and all its principal officers, are non-residents of, and absent from, this Territory.

JAMES M. WOOLWORTH.

Subscribed in my presence, and sworn to before me, this 20th day of July, 1866.

ISAAC S. HASCALL,
Probate Judge, Dougl s Co.

Exhibit "A," referred to in the foregoing answer, being an account of money due by the plaintiffs to the defendant for the transportation of gold, &c., over and above the sums paid therefor.

Messrs. Kountze Bros.,

To the United States Express Co., Dr.

To transportation of gold, at the agreed rate of $5 per thousand

				Am't paid.	Am't rem'g due.
On	Jan'y 6th, '63.	To Chemical Bank, New York, of..	$6,000	$20	$10 00
		Do....do....do.....do....do..	2,100	8 50	2 00
	13.	Do....do....do.....do....do..	1,875	7 50	1 87
	20.	Do....do....do.....do....do..	2,250	10 80	45
	24.	Do....do....do.....do....do..	2,237	8 75	2 43
	28.	Drexel & Co., Philadelphia....	6,100	21 00	10 50
13	On Jan'y 28th.	To Drexel & Co., Philadelphia....	4,5001	15 00	7 50
		Do.....do.....do.....do..	5,250	17 50	8 75
	Feb'y 3rd.	Do .....do..... do.....do..	4,200	14 00	7 00
		Do.....do..... do.....do—	3,075	10 25	5 12
	7th.	Do.....do..... do.....do..	3,678	12 25	6 12
	10th.	Do.....do..... do.....do..	1,200	6 58	
	15th.	Do.....do..... do.....do..	3,000	10 00	5 00
		Do.....do..... do.....do..	5,550	18 50	9 25
	17th.	Do.....do..... do.....do..	4,325	12 50	9 12

				Am't paid.	Am't rem'g due.
	24th.	Do.....do.....do.....do..	1,200	5 00	1 00
	28th.	Do.....do.....do.....do..	3,600	12 00	6 00
		Do.....do.....do.....do..	4,325	12 75	8 87
	March 24.	Do.....do.....do.....do..	7,200	24 00	12 00
	Apr. 7.	Do.....do.....do.....do..	1,200	4 00	2 00
					$114 98
	Apr. 7.	To Drexel & Co., Phil'a.....	$1,425	$4 75	$2 37
		Do.....do.....do.....	2.850	9 50	4 75
	22.	Do.....do.....do.....	4,500	15 00	7 75
		Do.....do.....do.....	2,850	9 50	4 75
		Do.....do.....do.....	1,245	4 15	3 07
		Do.....do.....do.....	2,655	8 85	4 42
	May 4.	Do.....do.....do.....	1,200	4 70	1 30
	11.	Do.....do.....do.....	1,200	4 40	1 60
	14.	Do.....do.....do.....	4,650	15 50	7 75
		Do.....do.....do.....	4,575	15 25	7 62
	26.	Do.....do.....do.....	3,510	11 70	5 85
	26.	Do.....do.....do.....	5,100	17 00	8 50
	28.	Do.....do.....do.....	5,100	5 70	1 80
	30.	Do.....do.....do.....	3,225	10 75	5 37
		Do.....do.....do.....	2,625	8 75	4 37
	June 22.	Do.....do.....do.....	4.500	15 00	7 50
		Do.....do.....do.....	3,720	12 40	6 20
		Do.....do.....do.....	5,580	18 60	9 30
	25.	Do.....do.....do.....	2,460	8 20	4 10
	29.	Do.....do.....do.....	3,600	12 00	6 00
		Do.....do.....do.....	5,250	17 50	8 75
	July 2.	Do.....do.....do.....	6,300	21 00	10 50
14	July 2.	To Drexel & Co., Phil'a.....	6,300	21 00	10 50
		Do.....do.....do.....	6,300	21 00	10 50
		Do.....do.....do.....	5,250	17 50	8 75
		Do.....do.....do.....	5,670	18 90	9 45
	4.	Do.....do.....do.....	9,870	32 90	16 43
	10.	Do.....do.....do.....	1,968 75	6 50	3 34
		Do.....do.....do.....	3,750	12 50	6 25
		Do.....do.....do.....	5,437	18 12	9 06
		Do.....do.....do.....	5,812	19 38	9 64
	14.	Do.....do.....do.....	2.160	8 20	2 60
	20.	Do.....do.....do.....	5,400	18 00	9 00
		Do.....do.....do.....	5,760	19 25	9 55
	23.	Do.....do.....do.....	5,525	18 25	9 12
		Do.....do.....do.....	5,525	18 25	9 12
	26.	Do.....do.....do.....	4,852	16 17	8 04
		Do.....do.....do.....	5,572	18 58	9 28
	29.	Do.....do.....do.....	18,750	62 50	31 25
	Aug. 1.	Do.....do.....do.....	1,800	6 00	3 00
		Do.....do.....do.....	4,837	17 85	6 33
	10.	Do.....do.....do.....	9,600	32 00	16 00
	11.	Do.....do.....do.....	3,190	10 65	5 31
		Do.....do.....do.....	2,407	8 00	4 03
	17.	Do.....do.....do.....	2,250	7 50	3 75
	18.	Do.....do.....do.....	2,343	7 80	3 90
		Do.....do.....do.....	5,625	18 75	9 37
		Do.....do.....do.....	5,625	18 75	9 37
	26.	Do.....do.....do.....	5,250	26 25	
		Do.....do.....do.....	5,400	18 00	9 00
		Do.....do.....do.....	3,300	11 00	5 50
		Do.....do.....do.....	2,400	9 00	4 50
	Sept. 10.	Do.....do.....do.....	7,312	24 38	12 19
		Do.....do.....do.....	10,689	35 62	17 81
	16.	Do.....do.....do.....	1,687	5 63	2 81
					$523 12

				Am't paid.	Am't rem'g due.
Sept.	21, 1863.	To Drexel & Co., Phil'a	$1,170	$3 90	$1 95
	21.	Do.....do.....do	6,045	20 15	10 07
		Do.....do.....do	7,410	24 70	12 35
15	Sept. 23.	Do.....do.....do	5,850	19 50	9 75
		Do.....do.....do	5,265	17 55	8 77
Sept.	23.	Do.....do.....do	7,605	25 35	12 69
		Do.....do.....do	7,410	24 70	12 35
		Do.....do.....do	7,800	26 00	18 00
		Do.....do.....do	2,145	7 15	3 57
Sept.	28.	Do.....do.....do	2,925	9 75	8 87
		Do.....do.....do	9,450	31 50	15 75
		Do.....do.....do	9,450	31 50	15 75
	30.	Do.....do.....do	5,265	17 55	8 77
		Do.....do.....do	5,265	17 55	8 77
		Do.....do.....do	6,435	21 45	10 72
		Do.....do.....do	8,970	29 90	14 95
		Do.....do.....do	877 50	2 93	1 97
		Do.....do.....do	829	2 50	1 25
		Do.....do.....do	341 25	1 18	55
Oct.	7.	Do.....do.....do	3,990	13 30	6 65
		Do.....do.....do	5,250	17 50	8 75
		Do.....do.....do	6,510	20 70	10 85
	10.	Do.....do.....do	9,000	30 00	15 00
	12.	Do.....do.....do	7,350	24 50	12 25
		Do.....do.....do	6,090	20 30	10 15
	15.	Do.....do.....do	4,090 67	13 63	6 80
		Do.....do.....do	4,188 82	13 97	6 98
					$774 38
October	15, 1863.	Do.....do.....do	$4,620	15 40	$ 7 70
	19.	Do.....do.....do	2,520	8 40	4 20
	21.	Do.....do.....do	4,030	13 50	6 75
		Do.....do.....do	4,249 64	14 08	7 16
		Do.....do.....do	4,244 52	14 00	7 22
		Do.....do.....do	6,249 69	20 44	10 80
		Do.....do.....do	5,048 55	16 43	8 81
		Do.....do.....do	2,804 22	9 35	4 77
	26.	Do.....do.....do	5,175	17 25	8 62
Nov.	4.	Do.....do.....do	1,500	5 00	2 50
	18.	Do.....do.....do	5,850	19 50	9 75
	Nov. 21.	Do.....do.....do	10,650	35 50	17 75
16	Dec. 9.	To Drexel, Winthrop & Co.	5,250	17 50	8 75
	Dec. 24.	Do.....do.....do	4,950	16 50	8 25
Dec.	24.	Do.....do.....do	69,000	230 00	115 00
Dec.	31.	Do.....do.....do	5,850	19 50	9 75
Jan.	4, 1864.	Do.....do.....do	3,600	12 00	6 00
Feb.	1.	Do.....do.....do	1,500	5 00	2 50
	13.	Do.....do.....do	9,750	33 50	15 25
Apr.	6.	Do.....do.....do	3,900	13 00	6 50
May	13.	Do.....do.....do	7,500	25 00	12 50
	31.	Do.....do.....do	9,000	30 00	15 00
June	15.	Do.....do.....do	7,500	25 00	12 50
July	20.	Do.....do.....do	6,300	21 00	10 50
	23.	Do.....do.....do	5,250	17 50	8 75
	30.	Do.....do.....do	6,000	20 00	30 00
Aug.	9.	Do.....do.....do	1,950	6 50	3 25
	22.	Do.....do.....do	2,400	8 00	4 00
		Am't carried forward			$1,138 91

				Am't paid.	Am't rem'g due.
		Am't bro't forward			$1,138 91
Sept.	10, 1864.	To Drexel, Winthrop & Co., N. Y.	$2,550	$8 50	$4 25
	19.	Do do do	5,100	17 00	8 50
	24.	Do do do	4,500	15 00	7 50
	29.	To Drexel & Co., Phila.	5,250	17 50	8 75
Oct.	12.	Do do do	15,000	50 00	25 00
		Do do do	5,700	19 00	9 50
		Do do do	11,400	38 00	19 00
	19th.	Do do do	10,500	35 00	17 50
		Do do do	15,600	52 00	26 00
	26.	To Drexel, Winthrop & Co., N. Y.	29,775	99 25	49 62
		To Drexel & Co., Phila.	4,725	15 75	7 87
Nov.	2.	Do do do	7,125	23 75	16 89
		To Drexel, Winthrop & Co., N. Y.	10,725	35 75	17 87
		Do do do	11,312	27 37	18 68
	2.	Do do do	11,775	39 25	19 62
	5.	Do do do	10,275	34 25	17 12
		Do do do	8,475	28 25	14 12
	9.	Do do do	3,525	11 75	5 87
	12.	Do do do	12,825	42 75	21 37
17	Nov. 16.	To Drexel, Winthrop & Co., N. Y.	7,950	26 50	13 25
	Nov. 30.	Do do do	4,620	15 40	7 70
Nov.	30.	Do do do	14,775	49 25	24 67
Dec.	7.	Do do do	8,250	27 50	13 75
	15.	Do do do	2,225	10 75	5 37
	21.	Do do do	10,500	35 00	17 50
		Do do do	10,500	35 00	17 50
		Do do do	11,325	37 75	18 87
	21.	Do do do	6,000	20 00	10 00
	24.	Do do do	11,250	37 50	18 75
	28.	Do do do	11,400	38 00	19 00
		Do do do	11,400	38 00	19 00
		Do do do	15,750	52 50	26 25
	28.	Do do do	13,500	45 00	22 50
	28.	Do do do	6,750	22 50	11 25
		Do do do	6,450	21 50	15 75
Jan.	4, 1865.	Do do do	6,450	21 50	15 75
	7.	Do do do	1,012	3 37	1 68
		Do do do	7,125	23 75	11 87
	15.	Do do do	7,350	24 50	12 25
Feb.	2.	Do do do	2,550	8 50	4 25
		Do do do	2,100	8 95	4 55
	15.	Do do do	3,000	8 50	6 50
March	3.	Do do do	22,500	64 05	48 45
		Do do do	3,525	10 02	7 60
		Do do do	2,475	7 05	5 32
	4.	Do do do	4,987	14 28	10 69
	16.	Do do do	5,775	16 70	12 17
	18.	Do do do	1,500	4 50	2 00
Apr.	29.	Do do do	8,535	25 62	17 05
		To Chemical B'k, N. Y.	3,150	9 45	6 30
		Do do do	2,962	9 10	8 71
May	13.	To Drexel, Winthrop & Co.	14,940	46 35	28 35
		Do do do	1,830	5 70	4 05
	27.	Do do do	15,090	47 30	28 15
June	7.	To Chemical B'k, N. Y.	6,825	21 17	12 95
June	7, 1865.	To Chemical B'k, N. Y.	6,825	$21 18	$12 94
	21.	To Drexel, Winthrop & Co.	5,700	17 50	11 50
	24.	To Chemical B'k, N. Y.	7,102	21 80	13 71
Aug.	19.	Do do do	1,500	5 00	2 50
Sept.	20.	Do do do	7,050	23 50	11 75
		Do do do	5,250	17 50	8 75
18		Am't carried forward			$1,966 77

			Am't paid.	Am't. remaining due.
		Am't bro't forward		$1,966 77
		Do do do	5,925	19 50 10 12
Oct.	28.	To Chemical National B'k.	29,190	97 30 48 68
				$2,086 22

To transportation of government vouchers, at the agreed rate of $2 per thousand.

May	13, 1863.	To S. C. Easton, Leavenworth	$50,000	50	$99 50
	17.	Do do do	50,000	50	99 50
	30.	Do do do	50,000	50	99 50
June	2.	Do do do	50,000	50	99 50
	6.	Do do do	50,000	50	99 50
	12.	Do do do	50.000	50	99 50
July	10.	Do do do	50,000	50	99 50
	22.	Do do do	50,000	50	99 50
	26.	Do do do	50,000	50	99 50
Aug.	11.	Do do do	50,000	50	99 50
Oct.	24.	Do do do	50,000	50	99 50
Nov.	4.	Do do do	50,000	50	99 50
		Do do do	50,000	50	99 50
Dec.	24.	To Scott, Kerr & Co., Leav'th	50,000	50	99 50
Feb.	4, 1864.	Do do do do	50,000	50	99 50
	13.	Do do do do	50,000	50	99 50
Feb.	20, 1864.	To Scott, Kerr & Co, Leav'th	$50,000	50	$99 50
March	24.	Do do do do	50,000	50	99 50
Apr.	5.	Do do do do	50,000	50	99 50
	9.	Do do do do	50,000	50	99 50
	22.	Do do co do	50,000	50	99 50
	Apr. 23.	To chief quartermaster	50,000	50	99 50
19	May 6.	To J. W. Morris	50,000	75	99 25
	June 9.	Do do	50,000	75	99 25
June	13.	To J. W. Morris & Co.	50,000	25	99 25
July	14.	To J. W. Morris	50,000	1 90	98 10
	22.	Do do	50,000	1 00	99 00
Aug.	1.	Do do	50,000	1 00	99 00
	6.	Do do	50,000	1 00	99 00
	20.	Do do	50,000	75	99 25
	26.	Do do	50,000	1 00	99 00
Sept.	10.	Do do	50,000	1 00	99 00
	15.	Do do	50,000	1 00	99 00
	23.	To Levi Wilson	50,000	1 00	99 00
Oct.	3.	To J. W. Morris & Co.	50,000	1 00	99 00
Nov.	2.	To States Savings Asso., St. Louis	50,000	1 25	98 75
	3.	To J. W. Morris & Co., Leav'th	50,000	1 00	99 00
	21.	To States Savings Asso., St. Louis	50,000	1 50	98 50
	30.	To J. W. Morris, Leav'th	50,000	1 00	99 00
Dec.	8.	To J. W. Morris & Co.	50,000	1 00	99 00
	15.	To First Nat. B'k, Wash., D. C.	50,000	3 50	96 50
		To McCann & Metcalf, Neb. City	50,000	----	100 00
Jan.	28, 1865.	To First Nat. B'k, Wash., D. C.	$50,000	$3 50	$96 50
Feb.	22.	To S. J. Ruth, Leav'th	50,000	1 50	98 50
March	16.	Do do do	50,000	1 50	98 50
	24.	Do do do	50,000	1 50	98 50
Apr.	8.	Do do do	50,000	1 50	98 50
					$4,853 00
		Am't due for transportation of gold			$2,086 22
					$6,939 32

And upon the said papers were the following endorsements, to wit:

9 D. District Court. Kountze Bros. *vs.* U. S. Express Co. Answer. J. M. Woolworth, def't's att'y. Filed July 20th, 1866. Wm. Kellog, Jr., cl'k.

20 In District Court, Douglas county.

Replication.

KOUNTZE BROTHERS, plaintiffs,
vs.
THE UNITED STATES EXPRESS COMPANY, defendant.

And now come said plaintiffs, and for replication to the answer of the defendant filed in this cause, deny specifically and particularly each and every allegation of new matter contained.

And for further reply, the plaintiffs deny that they delivered said gold dust to the defendant to be conveyed from Omaha to Philadelphia under a "special contract," and plaintiffs deny that they made any agreement or contract with the defendant whereby the liability of the defendant was limited, as stated in said answer; and the plaintiffs expressly deny that in any manner entered into or assented to the alleged special contract, set forth in the second answer of said defendant, but the plaintiffs expressly allege that they objected to the same at the time. And the plaintiffs further deny that they did in any manner whatever deceive, or attempt to deceive, said defendant as to the value of said gold dust, and deny that they falsely and fraudulently, or in any other manner, represented to said defendant that said gold dust was of less than its real and actual value, and deny that they in any manner whatever represented to said defendant that said gold dust was only of the value of thirty-five hundred dollars; and further deny that said gold dust was of the value of four thousand dollars, and if it was of the value of $4,000, it was through inadvertence that it was not so marked on the package. Plaintiffs believe the allegation to be true that the rate of charges for conveying said gold dust between the places was five dollars on a thousand, or thereabouts.

21 Plaintiffs deny that said defendant did "well, faithfully and diligently" perform the terms of said alleged "special contract," but allege that whatever said defendant did do in regard to said gold dust, was done in a careless and negligent manner.

And for further replication to said answer, deny that at time the most usual route for transporting gold dust from Omaha to Philadelphia by the defendant was on or by way of the Hannibal and St. Joseph railroad, in the State of Missouri; but the plaintiffs allege that said route was unusual, and that said defendant was guilty of negligence in adopting said route for the transmission of gold dust at

the time when it did, but that said defendant should have transmitted said gold dust across the State of Iowa in the coaches of the Western Stage Company, which last-named route was the most usual with said defendant, and the only one it should have adopted had they exercised ordinary care and prudence in the premises.

The plaintiffs for further reply say that they have no knowledge (save from the allegations of said answer) in regard to a large body of 80 armed men with guns, &c., stopping the cars on said railroad and taking forcible possession of the same, or whether violence was threatened to the persons named in on said train, &c., but the plaintiffs ask that said defendant prove all of the allegations contained in said 3rd paragraph called 2nd answer of said answer, but the plaintiffs do deny that their said gold dust or any part thereof was taken from the possession of the defendant in the manner alleged in said
22 answer, and deny that the same was taken by the acts of the organized enemies of the government of the United States or by the acts of any riot or insurrection or any other cause or causes which the defendant could not with reasonable care and prudence have prevented, But the plaintiffs admit that civil commotion did prevail in the State of Missouri and along the line of said railroad during the year 1864, and during that time said State was in a condition of civil strife, and that it was at that time extremely useless and hazardous to pass over said railroad either goods or passengers, all of which was well known to the defendant.

And for replication to the defendant's 3d answer of said answer the plaintiffs admit that at the time alleged war existed between the United States and the so-called Confederate States, but they deny that the army of the said Confederate States, or any part thereof, took the said gold dust, or any part thereof, from the possession of the defendant, as is alleged in said answer, and the plaintiffs deny each and every allegation contained in said 3d answer, except as herein admitted.

And for replication to the 4th answer of said answer the plaintiffs admit that the defendant has returned gold dust to the plaintiff of the value of four hundred thirteen 9-100 dollars, and no more. And for further replication to the fifth answer of said answer the plaintiffs admit that they have during the period set forth in said answer transmitted through said defendant considerable quantities of gold, silver, and evidences of debt and vouchers for claims against the U. S., and that the amount charged by said defendant was the same, or thereabouts, as set forth in said answer, but these plaintiffs deny that
23 they have ever, at any time, used any fraud or deceit to deceive and defraud the defendant as is alleged in the answer, and positively and most most emphatically deny each and every allegation or intimation of the answer in that regard; and further deny that they have in any manner whatever sought to or have induced the defendant to convey the said gold, silver, &c., for a sum or sums less than the customary charges of said defendant, but on the contrary the defendant has charged the plaintiff more than the rates

of . And they further deny that they ever did fraudulently and deceitfully, or in any other manner, represent to the defendant that said gold, silver, evidences of debt and vouchers, or either, or any of said articles was, or were of less value and amount than the said articles were in fact, with intention to defraud defendant, and they positively deny all the allegations in the answer in that regard; and further deny that the defendant has ever been misled or induced to receive any of the said articles by any other than truthful representations made by the plaintiffs to it relative to the matter aforesaid. And they also deny each and every allegation in said 5th answer to said answer contrived, except such as are herein admitted; and the plaintiffs now pray, as they have already prayed in and by their petition filed in this cause.

KOUNTZE BROS.,
By REDICK & BRIGGS,
Their Attorneys.

TERRITORY OF NEBRASKA, *Douglas County:*

24 Augustus Kountze, being by me first duly sworn, deposes and says that he is one of the plaintiffs in this suit; that he has heard read the above replication, and knows the contents thereof, and that the same is true as he verily believes.

AUGUSTUS KOUNTZE.

Subscribed in my presence and sworn to before me this 22nd day of October, 1866.

W. KELLOGG, JR., *Cl'k.*

And upon the said papers were the following endorsements, to wit:

G. D. Kountze Brothers *vs.* United States Express Co. Replication. Filed Oct. 22nd, 1866. W. Kellogg, jr., cl'k. Filed July 3rd, 1867. E. B. Chandler, clerk. Redick & Briggs, att'ys for pl'ffs.

And be it further remembered, that afterwards, to wit, on the said 3rd day of July, 1867, the said defendant filed in said court his demurrer to said replication, in the words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

KOUNTZE BROTHERS
vs.
THE UNITED STATES EXPRESS CO.

Now comes the said defendant, by J. M. Woolworth, its attorney, and demurs to the replication filed herein by the said plaintiffs, and for cause of demurrer allege as follows:

25 1st. The denial in said replication of misstatement of amount

of gold, or the value thereof, to said defendant's agent, and the mark thereon of value is hypothetical.

2nd. The said replication is a departure from the petition in the allegation of a cause of action.

J. M. WOOLWORTH,
Def'ts Att'y.

And upon the said paper were the following endorsements, to wit:

U. S. Cir't C't. 55 Kountze Bro's *vs.* U. S. Express Co. Demurrer to replic'n, J. M. Woolworth, def't's att'y. Filed July 3rd, 1867. E. B. Chandler, clerk.

And afterwards, to wit, on the day said July, the said court made its certain order, in the words and figures following, to wit:

KOUNTZE BROTHERS
v.
THE UNITED STATES EXPRESS CO.

This cause coming on to be heard upon the demurrer of the defendant to plaintiff's replication, and the court being fully advised in the premises, find that the said demurrer is not well taken and therefore overrule the same, and thereupon the said defendant duly excepted to the ruling of the court.

And afterwards, to wit, on the 6th day of said July, in the said court, were made and entered in the record thereof an order, in words and figures following, to wit:

KOUNTZE BROTHERS
v.
UNITED STATES EXPRESS CO.

Now at this day came the above-named plaintiff and defendant, and demanding a jury, the following named persons were called, to wit, Jesse B. Plumer, Edward Whitehorn, Samuel Bauserman, William Waugh, Timothy Kelley, W. A. McAndlish, Charles H. Gar, Joseph H. Burns, Ralph Bowman, Henry French, Lucius L. Hollbrook, Albert Tucker, who were duly empannelled to try the issues joined; and the said jury having heard the testimony adduced, the arguments
26 of counsel and the charge of the court, retired with the marshal of the district with instructions to return their verdict sealed to the clerk on Monday morning at nine o'clock.

KOUNTZE BROTHERS
v.
UNITED STATES EXPRESS CO.

And on the 8th day of July, 1867, the said jury returned into court their said verdict, in the words and figures following, to wit:

Now, this day, came the jury in the above-entitled cause into open court and rendered their verdict sealed, as follows: We the jurors in

the above-entitled cause find for plaintiff, and assess damages at $2,900, with interest from October 6, 1864, amounting to thirty-six hundred ninety-seven 50-100 dollars.

S. BAUSERMAN, *Foreman.*

And afterwards, on said day, said defendant in said court, presented to said judge his certain bill of exceptions, which was then and there signed and sealed by said judge, which bill of exceptions were in the words and figures following, to wit :

United States Circuit Court, District of Nebraska.

Bill of exceptions.

KOUNTZE BROTHERS
vs.
THE UNITED STATES EXPRESS CO.

Be it remembered, that on the 6th day of July, 1862, this cause came on to be tried before the Honorable James M. Love, judge presiding, and a jury duly impannelled to try the issues joined therein, and thereupon the said plaintiffs, to maintain on their part the said issues, produced Augustus Kountze as a witness in their behalf, who, being duly sworn, deposed as follows :

I am one of the plaintiffs; am a banker doing business under the style of Kountze Brothers. We do business in Omaha; have been engaged in that business at that place for past five years. The defendant has been engaged in carrying gold and packages from Omaha to all points east for the public, for hire for past five years. They had two lines east from here, one ran across Iowa by way of Des Moines, one south by way of St. Joseph, Missouri. The vans went once or twice a week across the State of Iowa, and two or three times a week down the river. We requested them to send our packages across the State, on account of the difficulties in Missouri. I do not think they would give us regular notice of when the express went east.

27 *Cross-examined.*

By defendant:

We knew the days of the week when the express went out east across the State and the days of the week when it went by St. Joseph. I do not recollect the days when it went across the State. I do not remember whether I was in the office when the package sued for was put up. I might have been there; the probability is it was put up in my presence. There were two cans in the package; one was a large one and one was a small one. The identical can was returned to us by S. B. Woolworth, the small can was the one returned. It had little holes in it and some of the gold was lost out. It was in another can when it was returned.

And thereupon the plaintiff rested his case.

And thereupon the defendant, to maintain on his part the issues joined, called upon the plaintiffs to produce receipt which was given by said defendant for the package sued for, whereupon the said plaintiff produced the same, a copy of which is hereunto annexed, marked Exhibit "A." And the said defendant thereupon, further to maintain on its part the said issues, produced as a witness on its behalf S. D. Barkalow, who being duly sworn deposed as follows:

I have lived in Omaha about nine years, except a short time when we were away. In September and October, 1864, I was clerk for S. B. Woolworth. I acted for him in doing business for defendant. He was agent here for defendant. I signed this paper with the name of Mr. Woolworth, (the paper marked "A.") The package was marked of the same value as that named in the receipt. It was sealed up
28 when it came to the express office. I did not know what it contained, except from the marks on it. I took plaintiff's word for the amount which it contained. The express went every week by way of Des Moines; two went every week to St. Joseph by stage. Express also went that way by the boats. The van went across the State on Wednesdays; it went by St. Joseph on the stage on Thursdays and Saturdays. The plaintiff's knew on what day of the week the vans went across the State, and the days of the week they went by stage down the river. We were never asked by them to send their express matter across the State until this package was lost; then we were asked to send them that way. The 29 day of September, 1864, was on Thursday. The out trip on that day was by stage down the river by St. Joseph. This paper was the way-bill for that day. It was filled out by me. (The paper shown witness is hereunto annexed marked Exhibit "B.") The messenger on that van was Edward Shelden; he carried this package. I recognize his check for the package—it is the letter S—he carried this package; he crossed the river here to Council Bluffs and went from there to St. Joseph by stage. I know Mr. Kountze's handwriting; this letter is in his handwriting, (said letter is hereto annexed marked Exhibit "C.") When an express went out we notified plaintiffs; that was our custom. Sometimes I went to their bank and told them, and sometimes the messenger notified them; sometimes we told them at the post office, and sometimes went to their office and told them.

Cross-examined.

By plaintiffs:

I will not swear that Woolworth was not notified to send their matter across Iowa; he might have been and I not known it;
29 there were delays sometimes in express going out; their matter sometimes lay in our office before it was sent out, sometimes twenty-four hours; there was no trouble across Iowa; they knew when the express went out without being notified; we did not notify them every time; might have been a week we didn't, not a month.

And thereupon the defendant produced Joseph Shepperd, who was duly sworn as a witness for defendant, and testified as follows:

I am general superintendent of defendant. I live in Chicago. I have been in defendant's employ fifteen years; in 1864 I was division superintendent of Iowa, Missouri, and Nebraska. I had charge of business of defendant in those States; my headquarters were here and at Council Bluffs; was travelling over defendant's line. I had a conversation with Augustus Kountze about this loss two or three weeks after it occurred; it was at his office I asked him how the amount came to be greater than the receipt stated and than the package was marked. He said he had put up the large package and marked it, and the small package came in and he put it in without changing the mark. I think he said it was about dinner time, and the rest in the bank had gone to dinner; he said something about dinner at any rate; he did not make any claim on us for this loss. I spent most of my time here and at Council Bluffs. The express went across the State once a week, on Wednesday. That line was mostly for local business. I did not consider it a through line; most of the gold went down the river; it went one or two days quicker in that way than it
30 did the others; we sent most of the gold that way; time was important to the bankers on account of fluctuations in price of gold; Kountze and the other bankers were anxious to get their gold through as soon as possible. After this robbery I put another messenger on across Iowa, and we ran two to accommodate them. I gave orders immediately after the loss not to send any more by St. Joseph; before that time it had been safe on that route. I was over it frequently and know about it. I inquired frequently if everything was right there; that was part of my business; we never had any trouble before. Kountze did not notify us not to send by that route until after this loss; he knew the day of the week when the express went down the river; it went on Thursday, and I gave orders to let him be notified when the express went out. Our charges to him were one-half of one per cent. or five dollars per thousand; that was our regular rate to bankers. The receipt given to Kountze for this package was in the usual form that we gave him; he had a book of blank receipts; he usually filled them up before coming to the office.

Cross-examined.

By plaintiffs:

I came here to look after this suit; was telegraphed to come; don't know as I came to be a witness. Kountze said he put up the package. I think he said the rest had gone to dinner; he said the little package came in after he put up the large one, and he put it in to get it off by express that day. I was here about six months; was absent sometimes two or three weeks. Kountze could not
31 have notified the agent to send across Iowa and I not known it; they would have told me; that was their duty. Most of the gold which we shipped went down the river; it was sent that

way because it went faster; they knew it along through the summer. I heard rumors of troubles in Missouri; they proved unfounded; I inquired after them when I was in St. Joseph; I found them false; We had no delays or detentions. Kountze told me what the value of the little package was; he said $400 or $500; I think it was $500; he told me he put the little package in after he had made up the large one.

And thereupon the defendant produced Edward Shelden, who was duly sworn, and testified as follows:

I am in the employ of the Merchants' Union Express Co.; I live at Nebraska City. In 1864 I was in employ of the United States Express Co.; I was messenger, and ran between Omaha and St. Joseph by stage. (Witness shown Exhibit "B.") This was the way-bill for 29 day of September, 1864. I recognize it by my check S on it. I carried the package mentioned. I often notified plaintiffs that I was going out; did so four or five times. They knew I went by St. Joseph and the days I went. I went out of here Wednesdays and left the Bluffs Thursdays. We van across the State; went out of here Tuesdays, and left the Bluffs on Wednesdays.

Cross-examined.

By plaintiffs:

There were no delays on my route; I do not think there was a single delay. We may have been a few hours late sometimes, but never failed to get on the day and go out on the next day.

And the defendant thereupon produced Frederick Cummer,
32 who was duly sworn and testified as follows:

I am messenger for defendant, and was in fall of 1864. I most always went down to the bank and notified plaintiffs I was going out. Sometimes they would say they had something, and sometimes that they had sent the day before or would send next day.

Cross-examined.

By plaintiffs:

I know I notified them. I would ask Buckalow if he had notified them, and if he hadn't I would go down and tell them. They knew the day, but they were dilatory. I had leisure when I was here. Mr. Shepard told me to always notify them. Sometimes I would keep the coach waiting for them. I am interested for defendant. I want them to pay their honest debts. I have no desire to relieve them.

And thereupon defendant produced Charles Clany, who was duly sworn and testified as follows:

I am clerk for plaintiffs; was employed by them in fall of 1864. (Exhibit "A" shown witness.) I put all the writing on those except

the signature; I did it at plaintiffs' office. We filled up the receipts at the bank and marked the packages there, and then took them to express office.

Cross-examined.

By plaintiffs:

I estimated the package, or else I took it from some one else; I don't know which. We estimated gold higher when we sent it than when we bought it. There were two lots of the gold, one large and one small. Plaintiffs made advances on this gold; they advanced some $1,700 on one lot; it belonged to a man in . They made an advance on the other. One lot contained 117 ounces, and the other about 25; we could not estimate exactly.

33 S. D. Buckalow, being recalled by defendant, testified as follows:

This package was delivered to me; I receipted for it.

And thereupon the defendant read in evidence to the jury the several papers hereto annexed, marked "A," "B," "C;" also entries appearing in exhibit marked D, hereto annexed, from the books of said defendant.

And thereupon said defendant read in evidence to the jury the several depositions hereto annexed, marked Exhibit "E." And thereupon the defendant rested his case.

And thereupon the said plaintiff recalled Augustus Kountze, who, being duly sworn, deposed as follows:

I had a conversation with Mr. Shepard. I told him, perhaps, the large can was put up ready to send, and then the little one came in and was put in without changing the mark. I notified Woolworth, the agent, not to send our gold by St. Joseph. We also directed that packages from our house at Denver should go through Iowa; we directed our Denver business to go through Iowa in summer of '64.

Cross-examined.

By defendant:

We might have been notified that this express was going by St. Joseph; I don't think that was their custom. They told us when they came to the bank with checks or we were at the post office that an express would go out. It was not regular; it was accidental. I may have made the statement Mr. Shepard has given. I think I was there when the gold was put up. I did not put it up; put it up. I may have valued it. I think I was there. I think the large lot came in and was put up and marked, and the small lot came in about dinner time, and I gave it to to put up, and went to my
34 dinner. I told him to put the small case in.

Re-examined.

By plaintiff:

At least one half our gold went across Iowa.

And thereupon the plaintiff rested his case.

The foregoing is all the evidence adduced on either side. And thereupon the defendant moved the court to charge the jury as follows:

That if the jury found from the evidence that the special contract was made and entered into by the parties, as alleged by said defendant, they must find for the defendant, unless it appeared from the evidence it was grossly negligent, which request the judge then and there refused to grant; to which order and refusal the said defendant then and there duly excepted, and asked the court to sign and seal this their certain bill of exceptions, which is done. But the court instructed the jury that while said contract was sufficient in law to restrict the liability of the defendant or a common carrier, yet if the jury find from the evidence that the defendant was guilty of actual negligence, the defendant was, notwithstanding said agreement, responsible, to which instruction defendant duly excepted. And thereupon the said judge then and there directed the jury that defendant was chargeable with negligence unless it exercised the care and prudence of a prudent man in his own affairs, to which direction defendant then and there duly excepted.

And afterwards, to wit, on the 11th day of July, 1867, the said defendant filed a motion for a new trial and to set aside the verdict, a copy of which is hereto annexed, marked "E;" and afterwards the said court overruled the said motion and refused to set aside
35 said verdict and grant a new trial, to which order and refusal the defendant then and there duly excepted, and prayed the said judge to sign and seal this their bill of exceptions, which is accordingly done.

[SEAL.]

J. M. LOVE,
Judge District Court U. S., Dist. of Iowa.

A.

[18]

UNITED STATES EXPRESS COMPANY,
Omaha, N. T., Sept. 29, 1867.

Received of Kountze Bros. one package, said to contain gold dust valued at thirty-five hundred dollars, and marked Drexel & Co., Philadelphia, Pennsylvania, which we undertake to forward to the nearest point of destination reached by this company only, perils of navigation excepted. And it is hereby expressly agreed that said United States Express Company are not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package, or thing for over $50, unless the just and true value

thereof is herein stated; nor for any loss or damage by fire; the acts of God or of the enemies of the government; the restraints of government, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war; nor upon any property or thing, unless properly packed and secured for transportation; or upon fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass.

For the proprietors.

S. B. WOOLWORTH, JR.,
Agent for Barkalow.

No. 193] United States Express Company forwarded from Omaha, N. T., to Buffalo, Sept. 29, 1864.—Naylor.

No. p'kges.	Weight.	A mount.	From whom received.	To whom addressed.	Destination.	Charges advanced.	Our charges.	Collect.	Prepaid charges.	Remarks.
		35 50	Kountze.....	Drexel & Co.	Philadelphia..	S.	Paid.	Thro'..	17 50	

Taken by guerillas on Han. & St. Jo. R. R., Oct. 3rd, 1864.

JOHN Q. NAYLOR, *Mess.*

No. 193.—Omaha to Buffalo, Sept. 29, 1864. UNITED STATES EXPRESS CO.

No goods must be returned unless ordered back by the consignor. No way-bill must be retained longer than one month, under any circumstances. If goods are short and cannot be found, deduct charges and return bill in statement, with such explanations as the case may demand. In case goods are not delivered, return the bill with charges, and retain bills of later date sufficient to cover the charges, returning them at the proper time, and retaining later ones, and so on until the goods are delivered or otherwise disposed of.

☞Fill in the above filings for No., &c., and fold bills when reported to Buffalo office, or marked by the lines length-wise first.

Agents will register name of office if this is detained. St——— office.

Messengers must register their names.

1st mess.—Shelden.
2nd "
3rd "
4th "
5th "
6th "
7th "

"C."

Collections payable in Omaha and vicinity promptly attended to and proceeds remitted on day of payment, less current rate of exchange. Collections made at all other accessible places. Taxes paid in Iowa and Nebraska. Government vouchers bought or collected

Office of Kountze Brothers, Bankers,
Omaha, Neb., Oct. 31, 1864.

37 OMAHA, NEB., *Oct.* 31, 1864.

James D. Andrews esq., division supt. U. S. Ex. Co., Saint Joseph, Mo:

DEAR SIR: We enclose a copy of a letter just received from Quincy office. We make no doubt whatever but what the small box of gold dust referred to was shipped by us; in the conversation had by our H. Kountze, the messenger who was in charge of the van which was robbed, he at once concluded that the small parcel was ours. When it left here it contained a little over 25 oz., but your ag't says that it was opened and doubtless some is lost out of it. We hope you may give this matter your immediate attention, and at once advise us of what you have done. Our package was to have gone originally to Drexel & Co., Phil'a, Pa., as should this much of it also be sent to them, after first being securely put up, so as to avoid further loss from or ac. of its present bad condition. Please write us immediately what you have done.

Yours truly,
KOUNTZE BROS.

ST. JOSEPH, *Nov. 5th*, 1864.

N. Worden, esq'r:

D'R SIR: Please put the box in a good wrapper and send to me here per first express.

Yours truly,
JAS. D. ANDREWS.

The G. D. and original can weighs 26 oz. We have enclosed the whole in a new tin can, but it is not soldered. I send it to you today.

Quincy, Nov. 8, '64.

Yours truly,
N. WORDEN.

38

B. Woolworth, esq'r:

D'R SIR: Please allow Messrs. Kountze Bros. to examine this can of gold dust, and if it belongs to them, if they wish, deliver it to them and take their receipt for it, or, if they prefer, send it to New York

"free." If delivered to them at Omaha, please send the receipt to me at St. Louis, and oblige

Yours truly,

JAS. D. ANDREWS.

St. Louis, Nov. 9th, '64.

C. P. Thayer, esq'r:

D'R SIR: As this was billed to y'r off., I send you receipt.

Yours, &c.,

J. D. ANDREWS.

(10) OFFICE OF THE UNITED STATES EXPRESS COMPANY, OMAHA, *Nov.* 23, 1864.

Rec'd of the United States Express Co., one pa. gold dust, weighing twenty-eight ounces, being part of a package shipped from here Sept. 29, 1864, valued at $3,500, said package being broken open and robbed by guerrillas on H. and St. Joe R. R.

The nett weight of gold dust, not including tin boxes, delivered back to us this day is twenty-four ounces 15 dwt. 10 grains, (say 24 oz. 15 d. 10 grs.)

KOUNTZE BROS.

39 *Deposition of witnesses produced, sworn, and examined under and in pursuance of the notice hereto annexed, at the time and place therein mentioned or hereafter certified, to be read on the trial of a case depending in the District Court for Douglas county, Nebraska Territory, wherein Kountze Brothers are plaintiffs, and the United States Express Company defendant.*

John Q. Naylor, of lawful age, being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposes and says:

1st question. What is your name, age, occupation and place of residence? How long have you been engaged in your present occupation?

Answer. My name is John Q. Naylor. My age 24 years; am messenger for the American Express Company, and have been for six years last past; and reside at Quincy.

2nd ques. On what line did you run as messenger for said American Express Company in October, 1864?

Ans. On the Hannibal and St. Joseph railroad, between St. Joseph, Missouri and Quincy, Illinois.

3rd ques. State whether or not at that time the defendant, The United States Express Company, ran over the same route at that time; if you answer nay, what, if any, arrangements did they have for doing their business on that line?

Ans. They had no messenger over that line at that time. They had an arrangement with the American Express Company by which the

messenger of the American carried the packets and freight over the line.

4th ques. What means of transportation was used by the American Express Company for carrying its packets and freight between St. Joseph and Quincy?

Ans. The Hannibal and St. Joseph railroad.

5th ques. Who was the messenger of said company who carried the van out of St. Joseph on the 3rd of October, 1864, to Quincy?

40 Ans. I was.

6th ques. State whether or noty ou also carried the van of the United States Express Company on that day from St. Joseph to Quincy.

Ans. I did, according to the arrangement between the two companies which I have mentioned, and according to which arrangement the messengers of the American Express Company always carried the news of the United States Express Company.

7th ques. State when you came into St. Joseph from Quincy the last time before the 3rd of October, in the transaction of your business as a messenger of the American Express Company.

Ans. On the first of October, 1864.

8th ques. State whether or not there was any trouble on the line at that time from armed men or otherwise, or whether or not there was any rumors of trouble or apprehensions of trouble as likely to occur.

Ans. There had been no trouble from that or any like cause, nor did I hear of any rumors or apprehensions of trouble, and I should have been likely to hear them if there had been any, for I was over the road every other day.

9th ques. State whether or not you went through from St. Joseph to Quincy on the 3rd of October without; if any, what trouble did you experience?

Ans. We did have trouble that day; we were robbed by a company of armed men.

10th ques. When and where did this occur, and what happened?

Ans. It happened about four o'clock in the afternoon of the 3rd day of October, 1864, about three miles or three miles and a half this side of Monroe, in Monroe county, in the State of Missouri. The passenger train bound west had been thrown off the track, and we were detained there waiting for the track to be cleared. I was in the mail car when I first saw a company of armed men come up. They

41 had arrived at the train. They were all mounted on very fine and well-trained horses. They were well armed with shot guns, I don't know the name of them, and with revolvers. Each had more than one revolver; some had two or three. The first thing I heard they hallowed to know if there were any federal soldiers on board; they cried Look out for the blue coats. I was then climbing around the mail car to get to the express car. We had all gone into the mail car to get a nap, while the wreck was being got off the track. When I got into the baggage car, no one knew it, as they had the doors and windows closed, as it was a cold, sloppy day. I

told the crowd there were soldiers outside, and opened the side door to look out, as I was not very well satisfied about it myself, for they came on us so sudden; we had dent time to hardly think. As soon as I opened the side door they rode right up to it with the revolvers all cocked. As quick as they came up I ran for the passenger coach, as I had a soldier's blouse on. Before I had got out of the car they had demanded of a brakesman and taken his oil-cloth overcoat. When I got into the coach I at once threw off my blouse and threw it under the seat. Then I stood there by the door, waiting the consequences. In a few minutes Mr. came in and told me they were looking for me. I then asked him what I should do. He told me not to wait, but to go right in and give up the money as they demanded it. When I opened the express car door on my way in, met the leader and one of his men with revolvers cocked. They put them to my head, and asked if I was express messenger. I told them I was. They then said, You son-of-a-bitch, get down and open that safe; you have given us trouble enough. I opened the safe,
42 threw back the lid, and told them there is what I had. As I opened the safe they ordered the baggage to be taken down and burnt, and then went to work opening the packages. Finding they contained all money, they countermanded the order about the baggage, saying they would get enough right here, meaning out of the express. I stood behind them while they were opening the packages. The leader asked if the wire was cut, while they were opening the packages, and some one replied that it was. He then turned around and shook hands with me, saying, at the same time, "Agent, this is good enough to shake hands on." After they got the packages open and had taken the contents of them, and given them to the leader, they came to these cans of gold; they took some out. I told the captain they were specimens of iron ore, and he put one or more down. They took one package which was done up in brown paper. It contained at any rate two and perhaps three cans. One of the cans in the package was a small one, and lay in a chair. As I came along, I threw a newspaper over it, and so they didn't see it, and went off without it. They took the other cans in the package, and they also took several other cans of the gold. There were two or three cans saved besides the little one. I done the little one up in paper, and took it to Quincy with the balance of my van, and turned it over to the agent of the American Express Company, as I always did all our packages. I came back the next morning. It did not come back that morning, because they had to get the can soldered, for the captain or one of the men who robbed us ran their knife into the can. It came back afterwards to Mr. Crandell, the agent of the company at
St. Joseph. The men, after robbing us, ordered the coaches
43 burnt and the freight cars, which was all done. They also robbed a part of the passengers. I saw them in the coaches. They also took all the fire-arms on the train. After the coaches and cars had got under good headway burning, they went off.

11th ques. State whether or not you and the men on the train could have resisted them successfully.

Ans. We could not. We were attacked so suddenly, we had no time to prepare to resist them, and if we had had time, we could have done nothing, for they were in numbers which overwhelmed us, and were heavily armed, and were very rapid in their movements in all they did.

12th ques. State whether or not you remember any particular package directed to Drexel & Co., Philadelphia; if so, describe the same.

Ans. I remember I had a package of gold dust marked $3,500 from Omaha, directed to Drexel & Co., Philadelphia, which was lost by this robbery. I remember it by the name which I wrote.

JOHN R. NAYLOR.

Owing to the absence of witnesses the taking of depositions is hereby adjourned till to-morrow, Aug. 23rd, 1866.

Charles H. Angel of lawful age, as hereinafter testified, being produced, sworn, and examined on the part of the defendent, deposeth and says:

1st ques. What is your name, age, occupation, and place of residence?

Ans. Charles H. Angel; aged 30 years; reside in Hannibal, Missouri, and occupation freight conductor on the Hannibal & St. Joseph railroad.

2nd ques. What was your occupation in October, 1864?

Ans. I was freight conductor on said road.

3rd ques. Where were you on the 3rd day of October, 1864?

Ans. Conducting a freight train from St. Joseph, Missouri, to Quincy, Illinois, on said railroad.

4th ques. State whether or not you experienced any detention on that day; if so, what was the cause thereof, and when did the same occur?

Ans. I did; about two miles west of Monroe, in this State; caused by a passenger train running west being thrown from the track.

5th ques. State fully all that happened while you were so detained there.

Ans. I came up with my train, composed of thirteen freight cars, running from west to east. The passenger train from St. Joseph was ahead of me. I left my train, and went through the coaches of the train which was thrown from the track; had been there about ten minutes. I was between two of the coaches off the track, walking towards my train, when a company of armed men, mounted, came up four abreast. They held their bridles in their teeth, and cocked revolvers in each hand. The first thing I heard they called for the man with the blue coat on. I looked around; they were about a dozen feet behind me. They dismounted all but two or three, and stationed those that were mounted around the train to prevent any one from escaping. I kept outside, and did not see what went on inside. But after they came out of the cars, I saw them put the money which they had got in the cars in their saddle bags. I also saw about the same time a part of their command at a distance of about three-quarters of a

mile. After they had gone through the cars, and got what they wanted, they ordered Count Harris, who was the conductor on the passenger train bound east, and Jack Tisdal, Mr. Bishop, Mr. Stode, and myself, to set fire to the cars. We at first hesitated about doing it, but the second order came, and we fired four passenger
45 coaches and ten freight cars. When they were about half burned up they left. When they first came up they called out for soldiers, and asked Count Harris, the conductor, if he had any on the train. They came on us so sudden we had no chance to prepare, and they overwhelmed us by their numbers and violence. They took off all the fire-arms on the train, and bursted open boxes to find more.

CHARLES H. ANGEL.

Luke Benham, of lawful age, being produced, sworn, and examined, as hereinafter certified, deposeth and says:

1st ques. What is your name, age, occupation, and place of residence?

Ans. My name is Luke Benham; aged 33 years; occupation freighter; residence, St. Joseph, Missouri.

2nd ques. Where were you on the 3rd of October, 1864?

Ans. I was going on the passenger train on the Hannibal & St. Joseph railroad, from St. Joseph, Mo., to Quincy, Illinois.

3rd ques. Did you experience any detention? if so, where, when, and what was the cause of it?

Ans. I did, about 4 o'clock in the afternoon of that day, a little this side of Monroe, in this State. We were first detained by the train bound west, off the track.

4th ques. What happened while you were there?

Ans. I was in the passenger car with my family when I saw a company of armed men ride up to the train. They called out for federal soldiers. My wife was frightened, and I was occupied with her, and did not pay attention to what was going on outside, except I saw them put a guard around the train. The first thing afterwards I saw of them some of them came in, and searched the car where I
46 was, and the passengers in it, for arms. They took all the arms and some watches, but did not take any money that time. They came through again, and took some money and watches. I saw a part of the command at a distance, perhaps a mile off. I saw them coming out of the baggage car, where the express matter was with the money. They afterwards burned the train. This part of the State of Missouri was from time to time infected by armed bands of men organized with leaders, and often operating in small parties. They were occupied in breaking the railroads and telegraph connections, burning bridges and robbing the people. They were supposed to be acting under orders from General Price, and other confederate officers. They acted in the interest of the rebels against the Union men and forces. Their existence was occasioned by the war, and when it closed they disappeared. The United States forces in Missouri were constantly engaged operating against them. Large num-

bers of the U. S. force were so engaged at the time of this occurrence. I apprehended no difficulty when I left St. Joseph, and had heard no rumor of trouble or apprehensions of trouble. I had with me seven thousand four hundred dollars at the time. I hid it from them, but I showed them a little over a hundred dollars I had in my pocket book, and told them it was all I had to take me to Chicago and back, and they let me keep it. I mean to say they burnt the passenger train which was off the track, and the freight train that was behind us. They called themselves Hughes' band. Hughes operated under orders from Bill Anderson, who commanded a part of the rebel forces in this part of the State.

L. BENHAM.

47 Samuel B. Woolworth, jun., of lawful age, being produced, sworn and examined, as hereinafter certified, deposeth and sayeth:

1st ques. What is your name, age, occupation and place of residence?

Ans. My name is Samuel B. Woolworth. aged 40 years, occupation book business, and reside in St. Joseph, Missouri.

2nd ques. Were you once connected with the United States Express Company, the defendant in this suit; if so, when and in what capacity?

Ans. I was agent for said company at Omaha, Nebraska, during the year of 1864.

3rd ques. State whether or not you remember receiving from the plaintiffs, Kountze Brothers, a package said to contain gold dust of the value of thirty-five hundred dollars, in the last of September, 1864.

Ans. Yes.

4th ques. State whether or not you gave any receipt to them for the money. If you did, state what was the form of it.

Ans. I did; it was of the form of the blank which I here produce. and ask to have appended to this my deposition, as a part of my answer to the above question. The blanks on this paper were filled to correspond with the directions given by the plaintiff.

(The paper spoken of by the witness is here annexed):

UNITED STATES EXPRESS COMPANY,

Omaha, N. T., 186 .

Received of , said to contain , valued at dollars, and marked , which we undertake to forward to the nearest point of destination reached by this company, only perils of navigation excepted. And it is hereby expressly agreed that said United States Express Company are not to be held liable for any loss

48 or damage of any box, package or thing, for over $50 00, unless the just and true value thereof is herein stated; nor for any loss or damage by fire, the acts of God, or the enemies of the government, the restraint of governments, mobs, riots, insurrections

or pirates, or from any of the dangers incident to a time of war ; nor upon any property or thing, unless properly packed and secured for transportation; or upon fragile fabrics, unless so marked upon the package containing the same ; nor upon any fabrics consisting of or contained in glass.

For the proprietors, —— ——, *Agent.*

5th ques. State whether or not the annexed paper was signed by any person ; and if so, by whom.

Ans. Yes ; it was signed by me as agent, or by Barkalow, with my name, acting under my direction and for me.

6th ques. State whether or not the said plaintiffs entrusted the said package to the said defendant to be carried by said defendant's express, and was received by said defendant from said plaintiff to be so carried upon any special contract ; if so, what was the same.

Ans. Said plaintiff did entrust said package to defendant to be carried by its express to nearest point of destination of package ; and said defendant received the same for that purpose upon a special contract, which appears in the above receipt. The rates charged by the defendant for this package, and for carrying other packages for the plaintiffs, was less than the rates charged to people generally.

7th ques. What was the appearance of the package, and what did it contain?

Ans. It was done up in brown paper, according to my best
49 recollection. The brown paper appeared to contain two tin cans, such as plaintiffs usually shipped gold dust in, put one above the other, and a third small can put beside the other two.

8th ques. State whether or not you ever returned to the plaintiffs any gold packages, or part of the gold sued for in this action ; if you did, when and where, and what occurred at the time you did so.

Ans. I returned a small tin can containing gold ; my impression now is, it was between twenty and twenty-one ounces ; it was some time after the express was robbed on the Hannibal and St. Joseph railroad, in October, 1864. I remember there had been some correspondence about the package between the Omaha office and the Quincy office. The tin can had holes in it, as if the point of a knife had been inserted to see what it contained. It was in another tin can. I received it at Omaha and took it to Augustus Kountze, one of the plaintiffs, at their office. We had trouble in getting the outside can open. Mr. Kountze identified the inside can as a part of the package which I have spoken of above, by a mark on the bottom of the can, which corresponded with a mark on the plaintiff's books, which he showed me. The entry on their books showed a purchase of the gold on the same day as the shipment. He received it, and I delivered it to him as a part of the package which I have described above.

9th ques. State whether or not you ever had any conversation with the plaintiffs, or either of them, touching a discrepancy between the amount of the package, as marked upon it by them, and for which you receipted, and its trne value ; if you did, when and where, and with whom, and what was said.

Ans. I did, at Omaha, at or about the time I delivered the
50 small package to him. It was with Augustus Kountze. The package I nave mentioned above was marked and directed by the plaintiffs, according to their usual custom. It was so marked by them as of the value of thirty-five hundred dollars. I receipted to them for a package "said to contain thirty-five hundred dollars." When I returned him the package, Mr. Kountze claimed more than the receipt called for. It was by his claiming more than the receipt to him called for that I learned he had sent more than he reported. He distinctly stated to me at that time, and I think at several other times, that the value of what he shipped was several hundred dollars more than he marked the package, and the receipt called for.

10th ques. How did you know what sum to receipt for when you received this package, and when you received other packages from him and from others?

Ans. I only knew it from the value set upon the package by them. They brought the packages there all done up, with the value marked on them. I knew nothing of their contents except what they marked them. I receipted for them at the sums which they marked on them.

11th ques. What did they pay you for carrying this package, and at what rate?

Ans. Seventeen dollars and a half; the customary rates being one half per cent. for bankers.

12th ques. On what day of the week did the messenger of the United States Express Company leave Omaha to go east, in September, 1864, and at the time you received this package?

Ans. On Wednesday.

13th ques. On what day of the week did you receive the package for the plaintiffs?

Ans. Thursday.

51 14th ques. State whether or not the plaintiff knew by what route the package would be sent, whether the Iowa route or St. Joseph route, at the time they brought it to you to be shipped?

Ans. Yes; they knew it was coming by the way of St. Joseph. I notified them that a messenger was going out on that route, and they got this package ready to go by it.

S. B. WOOLWORTH, JR.

Alexander H. Lacy, of lawful age, being produced, sworn and examined, as hereinafter certified, deposeth and says:

1st ques. What is your name, age, occupation and residence?

Ans. Alexander H. Lacy, aged 27 years, and by occupation a newspaper reporter, and reside in Hannibal, Missouri.

2nd ques. What was your occupation in October, 1864?

Ans. Route agent for the P. O. Department on the Hannibal and St. Joseph railroad.

3rd ques. Where were you on the 3rd day of October, 1864?

Ans. I was on the Hannibal and St. Joseph railroad, going from St. Joseph, Missouri, to Quincy, Illinois, on the train Count Harris was conductor of, and John Q. Naylor express agent.

4th ques. State whether or not you experienced any detention; if you did, when, where, and what was the cause of the same.

Ans. We left here on time the morning of the 3rd of October, and arrived at Honeywell, Shelby county, on time. At that place we were informed that the train bound west ran off the track about 3 miles west of Monroe station. We had four passenger coaches, and the conductor of the westward bound train took two of our coaches
with his engine and repaired to the track, took on the passen-
52 gers, and came in to St. Joseph. After this train passed, Count Harris took the two coaches that were left and went on to the wreck, between 4 and 5 o'clock in the afternoon. Shortly after we arrived at the wreck, a heavy freight train came up in our rear.

5th ques. State what happened while you remained there.

Ans. We were attacked by a party of armed men, mounted. The first inquiry they made was, if there were any federal soldiers aboard. They were told there was none. They rode around the train flourishing their arms. They were evidently after soldiers. When they were satisfied there were no soldiers aboard the train, they went into the baggage-car and commenced throwing the baggage out. They saw the safe of the express company in the car, and then asked who the agent was, and where he was. Naylor was pointed out to them, when they asked him, with revolvers cocked, to open the safe. He could not do otherwise than open the safe, and they made way with the contents. They then burned the three coaches that were off the track and the freight train that was in our rear.

6th ques. State whether or not you recognized any of the party; if you did, whom and how.

Ans. I recognized the officer in command as a brother of Oliver Hughes, the chief of the band, by his resemblance. I knew Oliver Hughes. These men were his troop. Hughes was a regularly commissioned confederate officer under General Price, and came up into this part of the State for the original purpose of recruiting.

7th ques. State whether or not you saw a can of gold dust which these soldiers left on the train.

Ans. I did; it was in the express in Naylor's charge. Some one called my attention to it, and said it was gold, and what fools they were for not taking it.

A. H. LACY.

53 William F. Allen, of lawful age, being produced, sworn, and examined, as hereinafter certified, deposeth and sayeth:

1st ques. What was your occupation in October, 1864?

Ans. Ticket agent and transfer baggage master on the Hannibal and St. Joseph railroad.

2nd ques. Where were you on the 3rd day of October, 1864.

Ans. I was on train No. 2, bound east from St. Joseph, on said railroad.

3rd ques. State whether or not you recognized any of the soldiers or officers who captured the train between Honeywell and Monroe on that day; if so, whom.

Ans. I recognized James Hughes, who was acting in command of the party.

4th ques. To what officer's command did these troops belong?

Ans. They belonged to Oliver Hughes' battallion of Price's army.

5th ques. State under what authority Oliver Huges was acting.

Ans. He was acting under orders from Gen. Price. They said at the time they were acting under orders similar to Bill Anderson from Gen. Price.

6th ques. State whether or not you saw any part of their faces at a distance; and if so, how you know them to have been so.

Ans. I did see some of the party at a distance, say one hundred and fifty rods off. I saw them join the party that had captured the train.

7th ques. State if you know who applied the fire to the cars when they were burned, and by whose orders they did so.

Ans. I set fire to one car, Cosent Harris to one, and Charles Angel to the other, under the orders of James Hughes.

8th ques. State whether or not you heard the men address James Hughes by any military title; if so, what was it.

Ans. I heard them frequently call him captain.

9th ques. How many were there in the whole command, and what are your means of knowledge?

54 Ans. They ordered supper at a neighboring hotel for 80 men, from which I inferred that that was their number.

W. F. ALLEN.

James M. Smith, of lawful age, being produced, sworn and examined, as hereinafter certified, deposeth and says:

1st ques. Where do you reside, and how long have you resided there?

Ans. I reside at Macon city, Macon county, Mo., and have lived there 10 years.

2nd ques. What is your occupation?

Ans. Selling goods.

3rd ques. State whether or not you were present at the time the rebels captured the train on the Hannibal and St. Joseph railroad, between Honeywell and Monroe, on the 3rd of October, 1864.

Ans. I was.

4th ques. State whether or not you recognized any one of the rebel soldiers who captured the train; if so, whom.

Ans. I did one; his name was William Taylor.

5th ques. State whether or not you knew whether he was enlisted in the rebel army and serving in it in that part of the State at that time.

Ans. I knew he was, for his father and mother both often told me so.

6th ques. How many troops were there who captured the train, and in the command?

Ans. I saw from forty to fifty.

7th ques. State what the father of young Taylor, whom you have spoken of as being enlisted with them, told you about it.

Ans. He told me that he and his wife, young Taylor's mother, had been to their camp to get him to come home. He was willing to come but his captain would not let him. His father and mother both cried when they talked to me about it.

55 8th ques. Do you know who commanded the company at the time, and what are your means of knowledge?

Ans. One of the men pointed out an officer and told me he was James Hughes, and that he was in command of their company.

9th ques. By what military title did they call him?

Ans. Captain.

J. M. SMITH.

STATE OF MISSOURI, *County of Buchanan, ss:*

I, C. M. Thompson, a notary public within and for said county and State, do hereby certify that at the time and place specified in the annexed notice, I took the deposition of John Q. Naylor, and on the following day to which the taking of said deposition was adjourned, and at the same place, I took the other depositions above of the several above-named witnesses; that before taking the said depositions, each of said witnesses was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition of each witness was written by me in his presence, and was by him signed in my presence.

In witness whereof I have hereunto set my hand and affixed my notarial seal, this 23rd day of August, 1866.

C. M. THOMPSON,
Notary Public.

Costs paid by defendants.—Fees.

7 witnesses per diem	$10 50
6,600 folios, 15 cts	9 90
Swearing witnesses	35
Mileage	48 10
Certificate	50
Stamp	10
Clerk's fee	50
	$69 95

56 STATE OF MISSOURI, *Buchanan County, ss:*

I, W. C. Toole, clerk of the Circuit Court within and for said county, do hereby certify that C. M. Thompson, before whom the within and foregoing depositions were taken, was at the date thereof, and now is, an acting notary public, duly commissioned and sworn to act as such within and for said county, and that the signatures an-

nexed to the respective certificates within, purporting to be his, are genuine, and that full faith and credit are due to his official acts as such.

In testimony whereof I have hereunto set my hand and official seal of said court at office in the city of St. Joseph, this 25th day of August, 1866.

W. C. TOOLE, *Clerk.*
By E. TOOLE, *Dept. Clerk.*

Deposition of John S. Harris, a witness produced, sworn and examined in pursuance of the annexed notice, and, as hereinafter certified, on behalf of the defendant in a certain cause depending in the District Court of the Territory of Nebraska, for Douglas county, between Kountze Brothers, plaintiffs, and the United States Express Company, defendant.

The said John S. Harris, being by me first duly sworn as hereinafter certified, deposes and says:

1st question. What is your name, age, occupation and place of residence? How long have you resided at the place of your present residence, and how long have you been engaged in your present business?

Answer. My name is John S. Harris; my age, 34 years. I am a conductor on the Hannibal and St. Joseph railroad, running
57 from the city of St. Joseph, in the State of Missouri, to the city of Hannibal, in the State aforesaid. I have been so employed for the seven years last past. I have resided at St. Joseph six years, and still reside there.

2nd question. Where were you, and in what business were you engaged on the 3rd day of October, 1864?

Answer. I was on the train of cars running on said railroad from St. Joseph to Hannibal. I was conductor.

3rd question. If any unusual occurrence happened on that day to said train state it.

Answer. The train was attacked by a command of confederate soldiers. We were taken by surprise and immediately disarmed, and therefore unable to make any successful resistance. Had we not been surprised we could hardly have resisted such a force as came upon us. The American Express Company, which ran on our road, had a messenger on the train; he and the express were robbed of all its money and valuables. I was robbed of my watch and money. I and some others were compelled to fire several cars, which were consumed.

4th question. State whether or not this command which then attacked you were a part of the force of the "so-called" Confederate States, and your means of knowledge.

Answer. It was a part of General Sterling Price's confederate army. General Price had at this time moved into Missouri from Arkansas with the army, which was a part of the forces of the so-called Confederate States. He sent out through Missouri numbers of officers for the purpose of collecting recruits and provisions, &c. Among others,

Captain Oliver Hughes was thus sent out into central Missouri by him. This captain was a commissioned officer in General Price's army.
58 He had other officers under him, and among them his brother. This brother commanded the company which attacked us. As Price moved north these officers collected their men and attacked several trains, and cut railroads at different points. The object of these attacks was to distract the federal forces, so as to aid General Price in his movements. They acted under his general orders. My information on this subject is derived from these officers at the time.

5th question. Do you know, if so state, where any of these officers or their men are at this time?

Answer. The men have disappeared out of the country. They could not safely live there, and their present whereabouts cannot be ascertained. The officers have all been killed.

6th question. State whether or not you had any knowledge of danger before your train left St. Joseph, and what means of knowledge you had.

Answer. I had no knowledge of anything which rendered it hazardous when we left St. Joseph, nor indeed until we were actually attacked. I was over the road daily. I was in daily and constant communication with others travelling through all parts of the State. I was situated so as to be advised of any danger.

J. S. HARRIS.

STATE OF MISSOURI, *County of Buchanan, ss:*

I, V. C. Robidoux, a notary public in and for said county and State, do hereby certify that at the time and place mentioned in the notice hereto annexed, Harris was by me first sworn to testify the truth, the whole truth, and nothing but the truth; that his deposition was then and there reduced to writing by J. A. Raynor, a
59 disinterested person, in his presence, and then and there subscribed by him in my presence.

Witness my hand and seal this 10th day of January, A. D. 1867.

J. B. ROBIDOUX,
Notary Public, Buchanan County, Mo.

Paid by def'd'ts. Notary fees $1.

Depositions of witnesses to be read on behalf of the defendant on the trial of a certain cause depending in the District Court for Douglas county, between Kountze Brothers, plaintiffs, and the United States Express Company, defendant, taken under and in pursuance of the notice hereto annexed.

At the time and place mentioned in the annexed notice, to wit, at the First National Bank in the city of Quincy, in the State of Illinois, and on the 12th day of September, at 10 o'clock in the forenoon of that day, I, the undersigned, notary public in and for the city of Quincy, in the county of Adams, in the said State, did attend for the purpose of taking depositions under and in pursuance of the annexed

notice, the said defendant being then and there present by E. M. Cooper, its agent; no one appearing for said plaintiffs; that I then and there held the said examination open until 5 o'clock in the afternoon, when, no one appearing for said plaintiff, I proceeded to take said depositions, as follows:

Frank Bradley, being first duly sworn, as hereinafter certified, deposes and says:

1st question. What is your name, age, occupation, and place of residence?

60 Ans. Frank Bradley; my age is 24 years; I am a clerk for the defendant; I reside at Quincy, in the State of Illinois.

2nd ques. Where did you live and in what business were you engaged in the months of October and November, 1864?

Ans. I lived in Quincy, Illinois, and was a clerk for the defendant at his office in that place.

3rd ques. State whether at that time you knew one John Q. Naylor; if you did, what business was he engaged in?

Ans. I knew him; he was messenger for the American Express Company, running from St. Joseph, Missouri, to this place, on the Hannibal and St. Joseph, and Quincy and Palmyra railroads.

4th ques. State whether or not during that time he brought to your office any broken package purporting to be brought by him as messenger from St. Joseph; if he did, state when, describe it, and what was done and said at the time.

Ans. He did, on the 4th day of October, 1864; it was a small tin can, containing gold dust. Small holes had been made in the can, apparantly with a knife. He said it was a part of a package marked to Drexel & Co., Philadelphia, Pennsylvania, valued at $3,500. He said the rest of the package was taken by the rebels on the railroad on the day previous.

5th ques. What did you do with it?

Ans. As the gold was being lost through the holes, I sent to a tinshop and had another can made just large enough to take in this tin can. I put this tin can in it, and such of the gold as had come out while it was at Quincy. I then had the outside tin can securely sealed. I then sent it by the express to J. D. Andrews, at St. Joseph, Missouri.

6th ques. What was J. D. Andrews' business at that time, and why did you send it to him?

61 Ans. He was division superintendent for the defendant for the State of Missouri. I sent it to him to be returned to the consignor of the $3,500 package.

7th ques. When did you send it to him?

November 8, 1864.

FRANK BRADLEY.

STATE of ILLINOIS, *County of Adams, City of Quincy, ss:*

I, Clark H. Charles, a notary public in and for said city, county, and State, do hereby certify that at the time and place mentioned in

the annexed notice, I duly attended to take depositions; that no one appearing for said plaintiffs, I held the same open until 5 o'clock in the afternoon, when at the said place I proceeded to take the said deposition of Frank Bradley; that he was first sworn by me to testify the truth, the whole truth, and nothing but the truth; that I reduced the said deposition to writing in his presence, and he subscribed the same in my presence; and that said deposition was taken at the time and place aforesaid.

Witness my hand and notarial seal this 12 day of September, 1866.

[SEAL.] CLARK H. CHARLES, *N. P.*

And afterwards, to wit, on the said 11th day of July, 1868, the said defendant filed its certain motion in the words and figures following, to wit:

U. S. Circuit Court, May term, 1867.

Motion for new trial, &c.

KOUNTZE BROTHERS
v.
THE UNITED STATES EXPRESS CO.

And now comes the said defendant by J. M. Woolworth, its attorney, and moves the court for an order setting aside the verdict of the jury and for a new trial herein, for the reasons following, to wit:

1st. For the misdirection of the court to the jury that plaintiffs' cause of action, as alleged in their petition, was sustained by proof of defendant's alleged negligence as a common carrier.

2d. For the error of the court refusing to direct the jury that if they found the special contract alleged by defendant they must find for the defendant.

62 3rd. There was no proof that plaintiffs were an unincorporated association.

4th. The verdict was against the law and the evidence.

5th. The jury misconducted itself while in possession of the cause for deliberation.

J. M. WOOLWORTH, *Def'ts' Att'y.*

And afterwards, to wit, on the 12 day of July, 1867, the said court made and endorsed of record its certain order, in the words and figures following, to wit:

KOUNTZE BROTHERS
v.
THE UNITED STATES EXPRESS CO.

This cause coming on to be heard upon the motion of the defendant to set aside the verdict and for a new trial in this cause, and the court being fully advised in the premises, it is ordered that the said

motion be and the same is hereby overruled; whereupon the said defendant, by its counsel, duly then and there excepted to the said ruling of the said court.

And afterwards, to wit, on the said 12th day of July, 1867, the said court rendered its judgement in said cause, which was duly entered of record therein in the words and figures following, to wit:

KOUNTZE BROTHERS
v.
THE UNITED STATES EXPRESS COMPANY.

It is therefore considered by the court that the said plaintiff recover of the said defendant the sum of three thousand six hundred and ninety-seven dollars and fifty cents, together with their costs and charges herein expended, and execution is awarded therefor.

And afterwards, to wit, on the seventeenth day of July, 1867, was filed in said court a bond in the words and figures follow-
63 ing, to wit:

Know all men by these presents that we, the United States Express Company, James M. Woolworth and Jesse H. Lacey are held and firmly bound unto Kountze Brothers in the just and full sum of seven thousand dollars, to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Dated Omaha, July 13, 1867.

Whereas lately at a Circuit Court of the United States for the district of Nebraska, in a suit depending in said court between Kountze Brothers, plaintiffs, and The United States Express Company, defendant, a judgment was rendered in favor of said plaintiffs against said defendant, and said defendant has obtained a writ of error and filed a copy thereof in the clerk's office of said court to recover said judgment.

Now the condition of this obligation is such, that if said defendant shall prosecute his said writ of error to effect, and answer all costs and damages if he fail to make his said plea good, then the above obligation to be void, else to remain in full force and virtue.

THE UNITED STATES EXPRESS CO.,
By J. M. WOOLWORTH,
Its Att'y in Fact and at Law.
J. M. WOOLWORTH.
JESSE H. LACY.

Approved by—

J. M. LOVE, *Judge.*

And afterwards, to wit, on the 13th day July, 1867, was lodged in the office of the clerk of said court a copy of a writ of error, which writ of error was in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *ss:*

64 The President of the United States of America, to the honorable the judge of the Circuit Court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings as also in the judgment of a plea which is in the said Circuit Court before you in a certain cause wherein Kountze Brothers are plaintiff and the United States Express Company is defendant, a manifest error hath happened, to the great damage of the said United States Express Co., as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December, 1867, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, and D. W. Middleton, clerk of the said court, this 13th day of July, A. D. 1867.

E. B. CHANDLER, *Clerk.*

Approved by:

J. M. LOVE,
Judge of Dist Court, Dist. of Iowa.

65 The United States of America to Kountze Brothers, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the district of Nebraska, wherein The United States Express Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why a judgment rendered against said plaintiff in error should not be corrected, and why speedy justice should not be done in that behalf to the said parties.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, on this seventeenth day of July, 1867.

[SEAL.] E. B. CHANDLER, *Clerk.*

Approved by—

J. M. LOVE, *Judge.*

Service of within citation admitted this 1st day of September, 1867, by—

REDICK & BRIGGS,
Atty's for Deft's in Error.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, District of Nebraska, ss:

I, E. B. Chandler, clerk of the Circuit Court of the United States for the said circuit and district, do hereby certify that the above and foregoing is a true and faithful transcript copy and exemplifications of certain papers on file, and certain entries, orders, judgments and proceedings of record in my office, and of the whole thereof.

Witness my hand and the seal of said Circuit Court at Omaha, in said district, on this twenty-fifth day of February, one thousand eight hundred and sixty-eight.

[SEAL.] E. B. CHANDLER, *Clerk.*

Supreme Court of the United States.

OCTOBER TERM, 1890. — No. 266.

UNITED STATES EXPRESS CO., Plaintiffs in Error,

vs.

KOUNTZE BROTHERS.

In Error to the Circuit Court of United States for District of Nebraska.

BRIEF OF PLAINTIFFS IN ERROR.

POTTER, LOMBEY & SOREN,

J. HUDLEY ASHTON,

Of Counsel.

GIBSON & WILLIAMS, Printers, Washington, D. C.

Supreme Court of the United States.

DECEMBER TERM, 1868.

THE UNITED STATES EXPRESS COMPANY,
Plaintiffs in Error.

vs.

KOUNTZE BROTHERS.

No. 266.

IN ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF NEBRASKA.

STATEMENT AND ARGUMENT FOR PLAINTIFFS IN ERROR.

The record shows that this suit was brought by the defendants in error against the United States Express Company, plaintiffs in error, on March 23, 1866, in a district court of the Territory of Nebraska, to recover from the company, as a common carrier, the value of certain gold dust forwarded by Kountze Brothers from Omaha to Philadelphia, by its express.

The petition or declaration appears to have been filed in district court, Douglas county, of the Territory of Nebraska, on the 23d of March, 1866, (Record, p. 3,) and describes the plaintiffs, Kountze Brothers, as "an association of persons, not incorporated, formed for the purpose of carrying on the banking business in Omaha, Nebraska, and who were, on the 6th of October, 1864, and still are, engaged in said business at said Omaha," and the defendants as "a foreign corpora-

tion, formed under and created by the laws of the State of New York." (Rec., p. 1.)

The summons, issuing upon this petition, was served by the sheriff of Douglas county, by delivering a copy of the writ to the "managing agent of the United States Express Company, at their office in the city of Omaha." (Rec., p. 3.)

The defendants filed an answer, in the territorial court, on the 20th of July, 1866, which, besides a general denial, and certain other defenses, alleged a special contract between the parties, whereby it claimed exemption from liability for the loss of the gold dust. (Rec., pp. 3–12.)

A replication was filed by the plaintiffs in the territorial court, on the 22d of October, 1866, (Rec., p. 14,) which charged a loss by the defendants' negligence. (Rec., p. 12.)

And on the 3d of July, 1867, these pleadings, as it appears, were brought and filed by the plaintiffs in the *circuit court of the United States* for the district of Nebraska, (Rec., p. 1,) and on the same day the defendants filed in the circuit court their demurrer to the replication. (Rec., p. 14.)

This demurrer the circuit court overruled, and the defendants excepted. (Rec., p. 15.)

The case then went to trial before Hon. James M. Love, United States district judge for the district of Iowa, and acting United States district judge for the district of Nebraska, and a jury, when a verdict was rendered for the plaintiffs for $2,900, with interest, (Rec., p. 15,) on which the circuit court entered judgment. (Rec., p. 40.)

On the trial, exceptions were taken by the defendants to the refusal of the court to instruct the jury as they requested, and to the charge as given to the jury. (Rec., p. 21.)

The record does not show under what statute, or on what ground, or by what authority, the case was removed or transferred into the circuit court of the United States.

There is certainly nothing in the subject-matter of the case which could bring it within the jurisdiction of that court. It was simply an action against the defendants on a contract to carry or forward property from Omaha to Philadelphia. No Federal law or question was involved or raised in the case.

We are left, therefore, to infer that the averments in the petition mentioned above, touching the *character of the parties*, was supposed to bring the case within the jurisdiction of the circuit court, as a suit "between a citizen of the State in which the suit is brought and a citizen of another State." (Act of 1789.)

We will first inquire whether there was any statutory authority for the transfer or removal of this case from the territorial court to the circuit court of the United States?

Secondly, whether the pleadings contain such averments of citizenship as show that the case is within the provisions of the constitution and the judiciary act of 1789, conferring jurisdiction on the circuit court in virtue of the citizenship of the parties, and could enable the court below to take cognizance of the case?

And, lastly, we will consider the errors we allege in the instructions of the court to the jury.

POINTS OF PLAINTIFFS IN ERROR.

THE JURISDICTION.

First.

The 2d section of the act of February 22, 1848 (9 Stats., 212) did not authorize the transfer or removal of this case from the court of the Territory of Nebraska, in which it was instituted, to the circuit court of the United States for the district of Nebraska.

That section of the act of 1848 declares that the provisions of the act of February 22, 1847, shall apply to all cases which may be pending in the supreme or other superior court of any Territory of the United States, which may be admitted as a State, at the time of its admission.

The 8th section of the act of February 22, 1847 (9 Stats., 130) provides that, "in all cases of federal character and jurisdiction commenced in said territorial courts [*superior courts*

of Territory of Florida, and the *court of appeals* of that territory] after said day, (March 3, 1845,) and in which judgments or decrees were rendered, or which are claimed to have been since pending therein, the records and proceedings thereof and the judgment and decrees therein are hereby transferred to the *district court of the United States for the district of Florida*," &c.

1st. That there was no authority for the transfer of this case into the *circuit court* of the United States for the district of Nebraska. The case, if it fell within the provision at all, went to the *district court*, and not to the *circuit court*. The act of 1847 is explicit, that the cases in the enumerated courts of the Territory of Florida should be transferred to the *district* court of the United States; and, if the act of February 22, 1848, authorized the transfer of this case into any federal court, it required its transfer to the *district court* of Nebraska. There would seem to be no answer to this suggestion whatever.

The circuit court was not authorized, therefore, to take cognizance of the case, and its judgment should on this ground be reversed.

2d. We say that the district court for Douglas county, Nebraska, from which this case seems to have been transferred, was not a "*superior court*" of that Territory within the meaning of the statutes referred to; and that, therefore, a case pending in it could not be transferred to the federal court.

3d. It is doubtful whether any case could be removed from the territorial court under this legislation, which was not of federal jurisdiction in virtue of the *subject-matter*. It would seem that cases which are within that jurisdiction, simply in virtue of the citizenship of the parties, are not within the purview of these statutory provisions.

Second.

Where a plaintiff claims a right to prosecute a suit in the circuit court of the United States, on the ground of the citi-

zenship of the parties, the pleadings must distinctly aver and show that they are citizens of different States, and that one of them is a citizen of the State where the suit is brought; and, if he omit to do this, and a judgment is rendered in his favor by the circuit court, this court, on writ of error or appeal, will reverse the judgment for want of jurisdiction in the court below.

Bingham *v.* Cabot, 3 Dall., 382.
Capron *v.* Van Noorden, 2 C., 126.
Montalet *v.* Murray, 4 C., 46.
Morgan *v.* Callender, 4 C., 370.
Wallen *v.* Williams, 7 C., 602.
Sullivan *v.* Steamboat Company, 6 W., 450.
Jackson *v.* Ashton, 8 Pet., 148; 10 Pet., 480.
Brown *v.* Keene, 8 Pet., 112.
Peguignot *v.* Pennsylvania Railroad Company, 16 How., 104.
Dred Scott *v.* Sandford, 19 How., 401.

Third

This doctrine is equally applicable to cases instituted in State courts, which may be the subjects of removal into the circuit court, on the ground of the citizenship of the parties.

Mr. Conkling, speaking of the 12th section of the judiciary act, (1 Stats., 79,) says: "It is evident, from the language of the 12th section of the judicial act, that it was not intended by it to extend the jurisdiction of these courts over cases brought before them on removal beyond the limits prescribed to their original jurisdiction; and such, as far as it goes, is the judicial construction which has been given to this section. It may, therefore, be safely assumed, that *all* the decisions affecting the original jurisdiction of the circuit court in the classes of cases which may be removed *are equally applicable to them as the subjects of removal.*" (Treatise, 4 ed., p. 155.)

Ward *v.* Arredondo, 1 Paine, 410.

Fourth.

The pleadings do not aver or show, nor is there any proof in the record, that the plaintiffs were citizens of Nebraska; and *non constat*, so far as this record discloses the character of the plaintiffs, they were not citizens of New York, where the corporation defendant was located.

1. The petition, as before stated, describes the plaintiffs as "an association of persons carrying on the banking business in Omaha, Nebraska." (Record, p. 1.) "This court does not hold," says Mr. Justice Curtis, "that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution."

Lafayette Insurance Company *v.* French, 18 How., 405.
Paul *v.* State of Virginia, Dec. Term, 1868. (Opinion by Mr. Justice Field.)

But if the plaintiffs were a single person, there is no proof that *he* was a citizen of the State where the suit was brought. The testimony of Augustus Kountze (Record, p. 16) was, that he is *one* of the plaintiffs, and is a banker, *doing business* at Omaha. He may have resided anywhere else.

2. The rule is settled, that where the jurisdiction of the circuit court depends on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each one must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained.

Strawbridge *v.* Curtiss, 3 Cranch, 267.
Ward *v.* Arredondo, 1 Paine, 410.

3. The averments of the petition referred to are not equivalent to an averment that the plaintiffs are citizens of Nebraska.

Brown *v.* Keene, 8 Pet., 41.
Pequignot *v.* Pennsylvania Railroad Company, 16 H., 104.

The plaintiffs, as already observed, may have been aliens, or citizens of New York, or some other State, doing business at Omaha. No legal inference that they were citizens of Nebraska can be drawn from any of the facts averred or proved in this record.

Fifth.

The provision of the 11th section of the act of 1789, prohibiting any civil suit before the circuit court against an inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, disables the circuit court in one State from taking jurisdiction of a civil suit against a corporation created by the law of another State, by the service of the process upon an officer of the corporation within the district or State where the court is sitting.

This proposition goes to the jurisdiction of the circuit court for the district of Nebraska to entertain this suit against a New York corporation, where the only foundation of jurisdiction was, or could be, the service of process upon defendants' agent in Nebraska. Such jurisdiction is expressly prohibited by the 11th section of the judiciary act of 1789, as was distinctly held by Mr. Justice Nelson, in two elaborate and well-considered opinions, in the cases of

Day *v.* India Rubber Company, 1 Blatch., C. C. R., 628.
Pomeroy *v.* New York and New Haven Railroad Company, 4 Blatch., 120.

In the first case it was held, that the circuit court in New York had no jurisdiction of a suit against a foreign corporation by levying an attachment on its goods in New York, or service of summons upon the president in New York, or by both; and that, according to the true construction of the 11th section of the act of 1789, the court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the State practice, if adopted by it, would author-

ize the institution of such suits by the attachment of their goods within the jurisdiction.

In the second case the same distinguished judge held, that a law of New York, authorizing the defendant corporation to transact its business within the State, could not avail to give the court jurisdiction of a suit instituted against it by service of process upon its officers within the jurisdiction of the State. "Its corporate existence in New York," said Judge Nelson, "can be created only by New York laws, and by making it a New York corporation."

Toland *v.* Sprague, 12 Pet., 300.
Picquet *v.* Sevan, 5 Mason, 35.
Richmond *v.* Dreyfous, 1 Sumn., 131.

The circuit court in New York is the only federal court which could entertain jurisdiction of this suit.

Sixth.

The description of the defendant corporation as a "foreign corporation, formed under and created by the laws of the State of New York," is not a sufficient or proper description of the defendants to bring them within the jurisdiction of the circuit court.

Marshall v. Baltimore & Ohio R. R. Co., 16 How., 314.
Lafayette Insurance Co. v. French, 18 How., 404.
Covington Drawbridge Co. v. Shepherd, 20 How., 227.

The petition fails to aver that the corporation defendant has its principal place of business in New York, and is therefore defective, under the opinion of Chief Justice Taney in the last case in 20 Howard.

THE MERITS.

Seventh.

The property was delivered, accepted, and carried under and subject to the provisions of a *special contract*, and not

under or in pursuance of a general undertaking on the part of the defendants to transport the property as common carriers.

1. The receipt given for the goods (Rec., p. 21) was filled up in the plaintiff's office, (where the package was marked,) and carried to the office of the company, where it was signed by their agent, and it is produced by plaintiffs at the trial. (Rec., pp. 20, 17.) It was proved that the plaintiffs had very often sent goods by this express, and always received such receipts. Kountze had a book of blank receipts in this form, and usually filled them up when he delivered property to the company. (Rec., p. 18.)

2. There can be no doubt at this time that such a receipt, accepted under such circumstances, constitutes an *agreement* between the company and the owners of the property, and has the same effect in law as if signed by both parties.

New Jersey Steam Navigation Co. v. Merchants' Bank, 6 H., 722.

York County v. Central R. R., 3 Wall., 111.

Farnham v. Camden & Amboy R. R., 55 Penn., 59.

Boorman v. American Express Co., 21 Wis., 152.

Eighth.

The defendants having been thus shown to have been *special carriers* of the property in question, the court should have instructed the jury that the plaintiffs could not recover in this action.

1. It is a question of law for the court, and not of fact for the jury, whether facts proved or admitted constitute a special contract or not.

Kimball *v.* Rutland and Burlington Railroad Company, 26 Vt., 248.

2. Whenever a special contract exists, changing the character of a carrier from a common to a private carrier, the latter cannot be declared against as a common carrier, but the action must be on a special contract, or for a breach of

duty arising out of such contract; and if the declaration in such case set forth the general liability of the defendants as a common carrier, the variance is fatal.

Kimball *v.* Rutland and Burlington Railroad Company, 26 Vt., 248.

Shaw *v.* York and N. M. Railway Company, 13 A. & Ell., (N. S.,) 347.

Crouch *v.* London and N. W. Railroad Company, 7 Exch., 705.

3. The declaration here was upon a supposed general undertaking as common carriers. (Rec., p. 1.)

Ninth.

The court should have instructed the jury, that by the express and unequivocal terms of this contract, there could be no recovery against the defendants beyond $50, unless they were guilty of gross negligence or misfeasance in regard to this property, and the loss was occasioned thereby.

1. The terms of the contract "leave no doubt as to the meaning of the parties," as was *not* the case, in the opinion of this court, with the contract considered and construed in the case of New Jersey Steam Navigation Company *v.* Merchants' Bank, (6 How., 384.) In that case the court said: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of goods, it should be required to be done, at least, in terms that would leave *no doubt* as to the meaning of the parties."

With this requirement these parties have complied. The contract gives the defendants absolute and complete exemption from liability for loss of property above the value of $50, in case the actual and true value thereof is not stated in the receipt. (Rec., p. 21.)

And we contend that effect should be given to this stipulation of the parties, at least to the extent of relieving the carriers from liability for every degree of negligence, except

that which has been termed gross or guilty negligence, or which amounts to positive *misfeasance*. We not press the question of the right of a carrier to stipulate for exemption from all liability for gross neglect or positive misfeasance, although many of the English cases go to the length of holding that he has that right; yet we do claim, that short of this, there is no limitation upon the right of a carrier of merchandise to stipulate for protection against the consequences of his "ordinary neglect;" that such contract, when fairly made, cannot be avoided upon any principle of what is called public policy, condemning it as unjust or unreasonable; and that when a contract of this character is fully established, and is clear and definite in its terms, as this is, the court should give it effect to this extent, and thus execute the intention of the parties. The court below was not asked to say, that the company would have been relieved if it or its agents had been guilty of misfeasance or fraud in dealing with this property, but simply to say, that under the contract of the parties there could be no recovery unless the jury found that the company had exercised less care than that which a gratuitous bailee is bound to exercise. A bailee without reward is held responsible only for gross negligence. "If the bailee," says Lord Holt, "is guilty of gross negligence, he will be chargeable, but not for any ordinary neglect."

Doorman *v.* Jenkins, 2 A. & E., 256.
Shiels *v.* Blackburne, 1 H. Bl., 158.
Beauchamp *v.* Powley, 1 M. & Rob., 38.

2. The intention of the parties being clear upon the face of the contract, the next inquiry is, whether it can be permitted by the court to have effect.

This court has never decided, we suppose, that a stipulation against losses from negligence, short of misfeasance or misconduct, cannot be made by a carrier of merchandise. It *has* said, that it will not find such a stipulation, unless expressed in "terms that would leave no doubt as to the meaning of the parties." (6 How., *supra.*) In the case of York

County *v.* Central Railroad, (3 Wall., 113) the question did not arise, but there Mr. Justice Field would seem to speak of *misconduct* of the carrier as a thing alone against which no contract could be maintained.

It will be found, we think, that the spirit of the later adjudications, in those States where the subject has been most carefully considered, is not opposed to any agreement or arrangement between parties to such a transaction, which shall relieve the carrier of *property* from responsibility for negligence which does not amount to positive misconduct or fraud, misfeasance, malfeasance, or gross negligence, in respect to the subject committed to his care.

Dorr *v.* New Jersey Steam Navigation Company, 1 Kern., 485.
Wells *v.* Steam Navigation Company, 4 Seld., 381.
Wells *v.* New York Central Railroad, 24 N. Y., 181.
Smith *v.* Central Railroad Company, 24 N. Y., 222.
Bissell *v.* The Same, 25 N. Y., 442.
Moore *v.* Evans, 14 Barb., 528,
Brown *v.* Eastern Railroad Company, 11 Cush., 97.
Buckland *v.* Adams' Express Company, 97 Mass., 124.
Kallman *v.* United States Express Company, 3 Kansas, 210.
Prentice *v.* Decker, 49 Barb., 21.

In England, the cases, before the passage of the carriers' act of 11 Geo. IV and 1 Will. IV, ch. 68, § 1, in regard to carriers' notices, exempting them from responsibility for loss beyond a certain amount, unless the service was paid for, according to the value of the property, held quite uniformly, that *gross negligence* was the criterion for determining the liability of carriers, whose notices to this effect were brought home to the knowledge of the parties employing them.

Balson *v.* Donovan, 4 B. & A., 21.
Smith *v.* Horne, 8 Taunt., 144.
Garnett *v.* Willan, 5 B. & A., 53.

Under the carriers' act it is held, that as to the enumerated

articles the carrier is not liable even for gross negligence, when the condition as to payment of the increased rate of charge is not fulfilled by the customer.

Hinton *v.* Dibbin, 2 Q. B., 646.

Owen *v.* Burnett, 2 Cromp. & M., 353.

And since the carriers' act of 1830, and the later railway and canal traffic act of 1854, (17 and 18 Vict., c. 31,) special contracts exempting carriers from the consequences even of their "gross negligence" have been supported by the courts.

Carr *v.* Lancashire and Yorkshire Railway Company, 14 Eng. L. & E., 340.

McManus *v.* Same, 2 Hurl. & N. 693.

Simons *v.* Great Western Railroad Company, 18 C. B., 804.

These and numerous other cases, though qualified in some respects by other decisions, contemporaneous and later, proceed generally upon the doctrine of C. B. Pollock, in Beal *v.* South Devon Railway Company, (5 Hurl. & N., 883,) that "a contract to which a person has signed his name is, *quoad* him, a reasonable contract. He has agreed to it, and therefore has no right to complain of it."

3. We submit, on the whole, that while the law may not permit this class of bailees to protect themselves against their own fraud or misconduct, or perhaps that of their agents, or some of them, there is no ground of public policy, as understood and expounded by the courts under this head of jurisprudence, upon which the validity of a stipulation against responsibility for negligence, not amounting to fraud or misconduct, can be successfully impugned.

Tenth.

The issue of fraud having been distinctly raised in the pleadings, the court should have instructed the jury that, if they found that the plaintiff had practiced a deception upon

the company in relation to the value of the property, the latter were not responsible for its loss.

1. The fraud and deception set up in the answer (Rec., p. 4) were clearly proved. Property worth over $4,000 was placed in the care of the company for transportation for the agreed rates for $3,500. It was to secure the company against such imposition that this clause was introduced into the contract. The company could only know the value of the package from information of the plaintiff. He was required to state it, and he falsified the value.

2. The rule is firmly settled, that the effect of such concealment is to exempt the carrier from responsibility under the contract, or, more properly speaking, to *nullify* the contract.

Story on Bailments, sec. 565.
Balson v. Donovan, 4 B. & Ald., 21.
Great N. W. R. R. Co. v. Shepherd, 8 Exch., 30.
Orange County Bank v. Brown, 9 Wend., 85.
Dunlap & Stewart v. Int. Steamboat Co., 97 Mass., 379.

In the case in 9 Wendell, Mr. Justice Nelson, speaking of a notice that the carrier would not be liable unless a premium was paid for goods beyond a certain amount, says: "If the owner omit to make known the value, and does not pay the premium at the time of delivery, it is considered *as dealing unfairly toward the carrier*, and he is liable only to the amount mentioned in the notice, *or not at all, according to the terms of the notice.*"

Eleventh.

Whatever liability the company may have incurred in respect to a portion of this property, there cannot be a doubt that, as *to that part of it of the value of which they were not informed by the plaintiff*, they could not be held responsible for any even the smallest degree of care, if any fraud or unfair concealment was made use of by the plaintiff; and the court

should have instructed the jury, that if such fraud was found by them, there could be no recovery against the company for *that portion* of the property, or for any amount beyond the valuation placed on the package by the plaintiff.

1. The court failed to discriminate between the liability of the company for the property of which they were informed, and which, it may be said, they agreed to carry, and for that of which they had no knowledge, and which they never agreed to take.

For the latter they incurred, clearly and certainly, no liability whatever; and the court should have so instructed the jury. The charge of the court upon the point of the liability of the company, assumed that they were equally responsible for the loss of that part of the property which was brought to their attention and that which was fraudulently concealed from them.

2. This distinction, in case of fraud, is clearly expounded by Chief Justice Bigelow in a late case.

Dunlap & Stewart *v.* Int. Steamboat Company, 97 Mass., 379.

"If any such fraud or unfair concealment is made use of," he says, "the effect is, in case of loss, that the owner can recover *only such sum as would be equivalent to the value of the property if it had been such as it was represented to be*, if no deceit or misrepresentation concerning it had been practised when the contract was entered into. * * *

"Therefore he cannot be held liable at all, *not even for gross negligence*, for the loss of any articles not embraced within the contract. He did not agree to receive or transport money beyond a certain amount, or merchandise of any kind; and he cannot be held liable for *any, even the smallest*, degree of care of that which he did not agree to take into his possession or keeping."

And in a late case in the English House of Lords, it was held, on full consideration, that where merchandise, not being

personal luggage, was to be paid for, and it was not, and the property was stolen by one of the company's servants, the company was not liable to the passenger even for gross negligence.

Belfast and B. and L. and C. Railway Company v. Keys, 8 Jur., (N. S.,) 367; 9 H. Lds. Cas., 556.

In that case, the jury found that the case did contain merchandise; that there was no improper concealment on the part of the plaintiff; and that the defendants were guilty of gross negligence.

In a late case in Maryland, the court say, of a receipt like the present, "the receipt constituted the contract. Like a valued policy, the amount of risk assumed by the appellee was fixed, and must, in case of loss, be the measure of the appellant's recovery."

Brehme v. Adams Express Company, 25 Maryland, 335.

Twelfth.

If the judgment is not reversed for want of jurisdiction in the court below, according to the preceding argument upon the question of jurisdiction, it should be reversed for the errors presented in the preceding argument on the merits, and assigned in the bill of exceptions, and a *venire facias de novo* should be awarded.

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